Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DELAWARE TRIBE OF INDIANS,

Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA, GALE NORTON, Secretary of the Interior, and JAMES E. CASON, acting as Assistant Secretary – Indian Affairs,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the court of appeals erred in holding that this Court's decisions in *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), necessarily determined that the Delaware Tribe of Indians abandoned its organized tribal status in an 1867 Agreement with the Cherokee, which holding conflicts with this Court's more recent declaration in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 77 (1977), that "[d]espite their association with the Cherokees, these Indians . . . have over the years maintained a distinct group identity, and they are today a federally recognized tribe."

II. Whether the court of appeals erred in giving no deference to the interpretation of the 1867 Agreement made by the Secretary of the Interior regarding the Delaware Tribe's status, and in refusing to consider the effect of post-1867 relations between the Delaware Tribe and the United States despite the Secretary's express reliance on legislative action and administrative practice to confirm her interpretation.

III. Where the Secretary determined in 1996, on the record following full administrative review with notice and opportunity for all affected parties to be heard, that a 1979 letter issued by a subordinate official limiting federal relations with the Delaware Tribe was erroneous and should be withdrawn, and direct federal relations restored, did the court of appeals err in holding that the Federally Recognized Indian Tribe List Act of 1994 and the federal acknowledgment procedures of 25 C.F.R. Part 83 prevented the Secretary from so correcting that error.

LIST OF PARTIES

As more fully explained in the Statement of the Case, the Cherokee Nation of Oklahoma was the Plaintiff-Appellant in the courts below. Gale Norton, Secretary of the Interior, and Aurene Martin, then Acting Assistant Secretary of the Interior, were Defendants-Appellees along with the Delaware Tribe of Indians. Pursuant to this Court's Rule 35.3, James E. Cason, the Associate Deputy Secretary who is currently handling the duties of the Assistant Secretary – Indian Affairs, has been substituted in the caption for Ms. Martin.

Although throughout the proceedings below the Secretary and the Acting Assistant Secretary have been aligned with the Delaware Tribe of Indians as Defendants-Appellees, pursuant to this Court's Rule 12.6 they are denominated "Respondents" with respect to this Petition.

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The Delaware Tribe of Indians respectfully petitions that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, as amended on denial of rehearing, is reported at 389 F.3d 1074 (10th Cir. 2004) (App. A). The order of the Tenth Circuit denying the petition for rehearing of the Delaware Tribe of Indians (App. E) is unreported. The order of the Tenth Circuit granting in part and denying in part the petition for rehearing of the Secretary and Acting Assistant Secretary (App. D) is unreported. The July 23, 2002, decision of the district court (App. B) is reported at 241 F. Supp. 2d 1374 (N.D. Okla. 2002); the December 20, 2002, decision of the district court (App. C) is reported at 241 F. Supp. 2d 1368 (N.D. Okla. 2002).

Previous decisions in the case, prior to its transfer to the United States District Court for the Northern District of Oklahoma, are reported at 944 F. Supp. 974 (D.D.C. 1996) and at 117 F.3d 1489 (D.C. Cir. 1997).

JURISDICTION

The decision of the Tenth Circuit was entered on November 16, 2004. Petitions for rehearing were separately and timely filed by the Delaware Tribe of Indians and by the Secretary and Acting Assistant Secretary – Indian Affairs. An order denying the petition of the Delaware Tribe of Indians was entered on January 11, 2005. An order granting in part, modifying the previous decision, and otherwise denying the petition of the Secretary and Acting Assistant Secretary – Indian Affairs was entered on February 16, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

TREATIES, STATUTES, AND REGULATIONS INVOLVED

Pertinent provisions of the Treaty with the Delawares of July 4, 1866, 14 Stat. 793 (1866); the Treaty with the Cherokee of July 19, 1866, 14 Stat. 799 (1866); 25 U.S.C. §§ 479a, and

479a-1; Pub. L. No. 103-454, 108 Stat. 4791 (1994), §§ 101-104; and 25 C.F.R. Part 83 (1996) are reprinted at Appendices G - J.

STATEMENT OF THE CASE

This case involves the existence of the Delaware Tribe of Indians as a governmental entity with which the United States maintains direct relations. It directly affects the status of more than 7,000 individuals who are members only of the Delaware Tribe.

In 1996, after notice and hearing and based on an eleven-volume administrative record, the Secretary of the Interior determined that a subordinate official had erred in issuing a 1979 letter withdrawing direct federal relations from the Delaware Tribe, which had maintained government-to-government relations with the United States since 1778. In an appeal brought by the Cherokee Nation of Oklahoma, however, the Tenth Circuit declared that the Secretary's decision to correct the prior error was "void" – not because the administrative record was inadequate (indeed, the Tenth Circuit expressly refused to consider most of that record) – but because the Tenth Circuit concluded that this Court had settled the matter in two decisions rendered more than 100 years ago.

Neither of those decisions, *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), which interpreted an 1867 Agreement between the Delaware and the Cherokee, nor the Agreement itself, states that the Delaware abandoned their own tribal organization, which statement was customary in other agreements of the period involving other tribes where such abandonment was intended. The Secretary recognized this in her 1996 decision and also credited the history of the subsequent 100 years of direct dealings between the Legislative and Executive branches of the federal government and the Delaware Tribe as confirming her interpretation. The Tenth Circuit, however, refused to consider that part of the administrative record.

In 1977, this Court actually did consider the status of the Delaware Tribe as a federally recognized tribe. In rejecting an equal protection challenge brought by a group of individuals who had relinquished tribal citizenship and stayed in Kansas when the main body of the Tribe was compelled to relocate in 1867 to what is now Oklahoma, the Court ruled in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), that Congress had a legitimate basis to distinguish between individual Indians and "recognized tribes." *Id.* at 85-86. Over a dissent that argued this was not a valid distinction, because in its view the Delaware Tribe had ceased to be a tribal entity in 1867, the Court referenced both its *Journeycake* and *Delaware Indians* decisions and nonetheless declared that "[d]espite their association with the Cherokees, these Indians . . . have over the years maintained a distinct group identity, and they are today a federally recognized tribe." *Id.* at 77. *See also id.* at 77 n.8. The Tenth Circuit, however, regarded this language in *Weeks* as "dicta" on the tribal status point and refused to consider any post-1867 history of relations between the United States and the Tribe. "Even *assuming Journeycake* and *Delaware Indians* conflict with the dicta in *Weeks* (which they do not), we nevertheless would be bound to follow those decisions." App. A at 24a (emphasis in original). It is clear that only this Court can correct the Tenth Circuit's erroneous holding regarding the meaning of this Court's decisions.

The Tenth Circuit compounded that error by conducting its own analysis of the 1867 Agreement without deference to the interpretation rendered by the Department of the Interior and without reference to the subsequent 100 years of direct government-to-government relations among the Tribe, Congress, and the Department, which the Department had used as confirmation for its interpretation. The Tenth Circuit thus substituted its own analysis for that of the agency recognized by Congress and this Court as possessing delegated authority and expertise in administering direct federal relations with tribes in general and federal recognition of tribes in particular.

Given that the status of a Tribe that has engaged in its own direct government-to-government relations with the United States since 1778 is at stake, and that thousands of the Delaware Tribe's members are directly and adversely affected, the importance of this case would be compelling even if the Delaware Tribe's status were all that was involved. But the Tenth Circuit's decision, with its additional conclusion that the Department erred in reestablishing direct relations with a tribe outside of the procedures in 25 C.F.R. Part 83 referenced in the Federally Recognized Indian Tribe List Act, casts the recognition of other tribes into doubt. Several other tribes have been recognized by the Department in recent years outside the Part 83 process. Moreover, Part 83 does not purport to deal with the power of the Department to correct its own errors, an agency power long-recognized by this Court. Yet the pernicious effect of the Tenth Circuit's decision is to cement in place a subordinate official's 1979 decision that the district court found "striking both for the superficiality of its analysis and for the sweeping impact of its conclusions." App. B at 44a.

Because the Tenth Circuit simply voided the Secretary's 1996 determination, rather than remanding for further proceedings despite pleas that it do so, the time for this Court to act is, respectfully, now.

I. Factual Background.

A. Pre-1867 Period.

The Delaware Tribe of Indians originally resided in the Northeast. In 1778, it become the first tribe ever to sign a treaty with the United States. *See* 7 Stat. 13 (1778) (Treaty with the Delawares, Sept. 17, 1778). Over the next few decades, in spite of assurances that each relocation would be the last, the Tribe was forced to move west by the pressures of white settlement, spending periods in Ohio, Indiana, and Missouri before the main body of the Tribe eventually came to reside in Kansas. *See* 7 Stat. 326 (1829) (Treaty with the Delawares, August 3, 1829).

Despite the promise that Kansas would be a permanent home, the United States sought yet another treaty with the Delaware Tribe in 1866, this time to relocate the Tribe to the Indian Territory. *See* 14 Stat. 793 (1866) (Treaty with the Delawares, July 4, 1866). In the Treaty of 1866, the United States promised to sell the Delaware Tribe 160 acres of land per member "in as compact a form as practicable" that would be "set off with clearly and permanently marked boundaries," promised that the Delaware Tribe would have the right to participate in any general council or territorial government established for Indian tribes or nations in the Indian Territory, and promised to "protect, preserve, and defend" the Delaware Tribe "in all their just rights." (App. G at 77a).

After signing the Treaty with the Delaware Tribe, the United States entered into a separate Treaty with the Cherokees to facilitate the resettlement of Indian tribes onto Cherokee lands in the Indian Territory. *See* 14 Stat. 799 (1866) (Treaty with the Cherokee, July 19, 1866). Article 15 of that Treaty set forth two options for resettlement. Under option one, "should any such tribe . . . settling in said country abandon their tribal organization," a single payment was to be made into the Cherokee national fund, that payment being a per capita sum to be determined based upon the number of individuals relocating in a proportionate ratio to the existing national fund. (App. G at 78a-79a). Thereafter, "they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens." *Id.* at 79a. Under option two, "should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation," they would then make two payments: (1) one for the price of having "a district of country set off for their use" that, if the tribe "should so decide," would be set off by metes and bounds and be equal to 160 acres per man, woman and child of that tribe; and (2) a second, per capita sum proportionately based upon the ratio of their number to

that of the whole number of Cherokees computed against the value of the existing national fund and "the probable proceeds of the lands herein ceded or authorized to be ceded or sold." *Id.* at 79a. After these payments, the members of such tribes "shall enjoy all the rights of native Cherokees." *Id.*

B. The 1867 Agreement.

The Delaware Tribe and the Cherokees met on the banks of the Caney River in Kansas in 1867 to negotiate the terms of an agreement for relocation under option two of the Cherokee Treaty's Article 15. *See* Supp. App. at 183-84.[1] The Caney River agreement described by metes and bounds a 10-mile by 30-mile strip of land to be set aside for the Delaware Tribe, included terms for the preservation of the Delaware tribal organization, and required the two payments. *See* Supp. App. at 328-29, C. App. at 282-83, C. Add. at 55-56. A purchase agreement for the land was finalized on April 8, 1867. While it called for the two payments and did not mention any "abandonment" of the Delaware tribal organization, the preamble included references to the Delawares' "consolidation" with the Cherokees, and the concluding paragraph referred to children of "such Delawares so incorporated" – language not contained in the Caney River agreement. C. Add. at 54-55, 57. When the Delaware Tribe learned of this, they held a general council of all members and unanimously reaffirmed their commitment to preserve their tribal organization. *See* C. App. at 299.

The Tribe faced escalating pressure from trespassers and the local Indian agent, the Rev. John Pratt, who withheld annuity payments until tribal members agreed to relocate. *See* Supp. App. 187-89. Eventually, the Agreement was approved by the President of the United States (as contemplated in the Agreement), the two payments were made, and the Delaware

1. "Supp. App." refers to the Supplemental Appendix jointly filed by the Secretary and Acting Assistant Secretary and the Delaware Tribe in the court of appeals; "C. App." refers to the Cherokee Nation's Appendix filed there; "C. Add." refers to the Cherokee Nation's Addendum filed there; "AR" refers to the Administrative Record in this matter.

Tribe moved to the Indian Territory. In their destitute status, more than 20 percent of the relocating Delawares died during the move. *See id.*

C. 1867 to 1979 Period.

After relocation to the Indian Territory, the Delaware Tribe continued to deal directly with the United States, maintained its own tribal government distinct from the Cherokees, and operated its own schools, churches, council houses, and traditional ceremonies. Supp. App. at 190-95; 191-93; 460-67. The Department of the Interior intervened in intra-tribal leadership disputes in 1873 and 1895, calling elections of the Tribe's Business Committee to assume governance duties for the Delaware Tribe. Supp. App. at 192. The Department also later determined that the Delaware Tribe could organize their government under the Oklahoma Indian Welfare Act, a statute enacted for recognized tribes. *See* 25 U.S.C. § 503; Supp. App. at 205-06. While the Department took a litigation position during the termination era (in a case involving claims relating to compensation for ceded lands) that the Delaware were a "claims organization," the agency later reaffirmed the continued existence of the Delaware Tribe's separate tribal government when the litigation concluded (as did the Claims Commission), approving the Delaware Tribe's new organizational bylaws in 1958 and 1962, and re-approving the Tribe's governing document as amended in 1974. *See* Supp. App. at 206-09, 293, 368-69, 384-92; C. App. at 403, 423. *See also Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm. 252, 266 (1952) (finding that, despite relocation to Cherokee lands, Delawares had "continued to maintain their tribal customs, practices, and their hereditary form of government").

Twice near the beginning of this period, the Delaware Tribe had to go to court to obtain from the Cherokee the full rights to which the 1867 Agreement entitled its members. These cases made their way to this Court, which each time confirmed that, through the Agreement, the Delaware Tribe had obtained enforceable rights for its individual members to enjoy the rights

of native Cherokees. *See Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894); *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904). As will be discussed in more detail below, the rights at issue were wholly consistent with option two (the "preservation option") of the Cherokee Treaty, and in neither of these decisions did this Court hold that the Delaware Tribe had abandoned its own tribal organization.

Throughout this period, before and after this Court's decisions, Congress consistently treated the Delaware Tribe as a sovereign entity, distinct from the Cherokee Nation, in various legislative enactments. *See* 27 Stat. 612 (1893); 28 Stat. 286 (1894); 33 Stat. 189 (1904); 43 Stat. 812 (1925), as amended by 44 Stat. 1358 (1927). In 1972, Congress again confirmed the Tribe's status by apportioning funds to the credit of "the Delaware Tribe of Indians" both for claims distributions to individuals and for tribal governmental purposes. *See* 25 U.S.C. § 1294(b). From 1971 to 1979, the Tribe contracted directly with and received grants from numerous federal and state agencies to provide services to tribal members as a federally recognized tribe. *See* Supp. App. at 212-15.

Meanwhile, the Cherokees had approved the Cherokee-Dawes Agreement, 31 Stat. 848 (1901), which provided for allotment of the Cherokee reservation and the dissolution of the Cherokees' tribal government by March 4, 1906. Eventually, only a periodically appointed chief was left to dispose of assets and prosecute claims. Muriel H. Wright, *A Guide To The Indian Tribes of Oklahoma* 73 (1968). The Cherokees did not revive their tribal governing body until 1975. The newly resurrected Cherokee government first objected to federal dealings with the Delaware Tribe in 1977, after the Indian Health Service confirmed that the Delaware were a tribe under the Indian Self-Determination and Education Assistance Act of 1972, 25 U.S.C. § 450. Supp. App. at 299-300. The Cherokees renewed their objections in 1978, but the Department confirmed that the Delaware Tribe was recognized, Supp. App. at 304, 431-50,

and included the Delaware Tribe on a list of recognized tribes published in 1978. C. App. at 256 n.12.[2]

D. 1979 to 1996 Period.

In 1979, however, without notice to the Delaware Tribe or an opportunity for the Tribe to be heard, the Tribe was summarily omitted from the list of recognized tribes published in the Federal Register that year; it was informed in a two-page letter from the acting deputy commissioner of the Bureau of Indian Affairs that the previous approval of its Bylaws was rescinded, and that, although it was still considered to be "a tribe within the Cherokee Nation," its members were no longer to look to their own government:

> The Cherokee Delawares may deal with their judgment awards and preserve their Delaware heritage and identity. For *governmental* purposes, however, they must look to the Cherokee Nation, of which they are an integral part.

See C. App. at 499-500 (emphasis in original). Nevertheless, the Tribe continued to maintain its own government, and Congress continued to treat the Tribe as a distinct entity carrying out its own governmental functions. In sections 7(c), 7(e), and 7(f) of Pub. L. No. 96-318, 94 Stat. 968 (1980), Congress directed payment of "programming funds" – for which only recognized tribes are eligible – to the "Delaware Tribe of Indians." Congress' distribution of the funds was consistent with its understanding of the Delaware Tribe's status as a distinct governmental entity, as stated in the legislative history of the 1980 act:

> This group, now known as the Delaware Tribe of Indians or Cherokee Delaware, acquired full political rights in the Cherokee Tribe, but they maintained

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2. Perhaps because it declined to review the full administrative record, the Tenth Circuit was thus incorrect when it stated, *cf.* App. A at 2a , that the Delaware Tribe had never been on the Department's list of recognized tribes.

> their group identity, having tribal chiefs and business committees continuously until the present time.

S. Rep. No. 96-628, at 5 (1980).

In 1992, following the request of the Delaware Tribe, the Department began a review of the 1979 letter decision. After a comprehensive, documented, and public review, with full notice and comment procedures observed, the Secretary of the Interior issued a final decision in 1996, concluding on the basis of an eleven-volume administrative record that direct government-to-government dealings with the Delaware Tribe more accurately reflected the bulk of the administrative practice. *See* C. App. at 242; App. F at 74a. Because the subordinate official's 1979 decision "did not consider the entire relevant legal record and did not construe accurately the provisions of the 1866 Treaty with the Delaware and the 1867 Agreement between the Delaware and Cherokee," the Secretary retracted the 1979 letter's position and reestablished direct federal relations with the Delaware Tribe of Indians. C. App. at 238.

II. Procedural Background.

The Cherokee Nation of Oklahoma challenged the Department's 1996 decision by filing suit in the United States District Court for the District of Columbia under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, naming as defendants the Secretary of the Interior and the Assistant Secretary but omitting the Delaware Tribe. The District Court for the District of Columbia concluded that the Delaware Tribe was an indispensable party under Federal Rule of Civil Procedure 19 and dismissed the action. 944 F. Supp. 974, 985. The Cherokees appealed, and the D.C. Circuit reversed. 117 F.3d 1489, 1503. In an opinion expressly limited to the Rule 19 issue on appeal,[3] the D.C. Circuit found that the

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3. Our holding, of course, is limited to deciding whether the district court erred in its Rule 19 ruling. We leave for initial decision by the district court the proper

(Cont'd)

Delaware Tribe could not rely upon their sovereign immunity to avoid joinder when the Delaware Tribe's immunity itself was challenged, and it remanded the case to the district court to consider the merits. *Id.* The case was then transferred to the Northern District of Oklahoma, and the Delaware Tribe was added as a party.

After an examination of the full administrative record, the District Court for the Northern District of Oklahoma determined that the 1979 letter purporting to withdraw direct relations with the Delaware Tribe was "manifestly flawed" and had been issued "without regard to legally mandated deliberation and proper procedural safeguards." App. B at 44a. The district court noted that the agency's basis for the decision set forth in the 1979 letter had not included an analysis of the historical, direct government-to-government dealings between the United States and the Delaware Tribe. App. B at 32a. After supplemental briefing, the district court also determined that the 1996 decision retracting the 1979 letter deserved "great deference" because, in contrast, it had been made after notice and comment, and after a careful, detailed review of the historical, direct government-to-government relationship between the United States and the Delaware Tribe. App. C at 61a.

The Cherokees appealed to the Tenth Circuit. The Tenth Circuit found, explicitly *without* undertaking a review of the post-1867 events recounted in the eleven-volume administrative record, that the Department's decision was based *solely* upon its legal analysis of the treaties and agreements entered into by the Cherokees and Delaware Tribe in the 1860s, App. A at 6a, and that neither the administrative practice nor the rest of the

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(Cont'd)

> interpretation of the 1867 Agreement with the Delaware Tribe as a party to the proceedings and in light of the full administrative record, which is not before this court.

117 F.3d at 1503 n.15.; C. App. 120-121 (ordering insertion of above text).

post-1867 course of dealings between the Delaware Tribe and the United States need be considered, App. A at 6a n.2. Instead, in an unprecedented opinion voiding an Executive branch decision to conduct direct relations with a tribe, the Tenth Circuit concluded that (i) the Department's analysis of the treaties and the 1867 Agreement was contrary to this Court's precedent in *Journeycake* and *Delaware Indians*, (ii) this Court's statement in *Weeks* that the Delaware Tribe was "a federally recognized tribe" was "dicta," (iii) the Secretary's interpretation of the historical documents comprising the record was not entitled to deference, (iv) the Secretary's 1996 withdrawal of the 1979 letter and her concomitant reestablishment of direct relations with the Delaware Tribe violated federal law and regulations, and (v) the lower court should be reversed, without remand to the Department for further proceedings. App. A at 17a-18a, 24a, 7a, 25a

The Delaware Tribe petitioned for rehearing, including a request for remand to the Department, all of which the Tenth Circuit denied on January 11, 2005. The Secretary and Acting Assistant Secretary also petitioned for rehearing, including a request that the Tenth Circuit not declare void all actions taken on the basis of the 1996 decision. The Tenth Circuit partially amended the opinion on February 16, 2005, to direct specifically that "any action taken by the agency on its 1996 final decision is void," and otherwise denied rehearing. App. D at 68a. The Delaware Tribe then sought a stay of mandate pending petition to this Court for a writ of certiorari, which the Tenth Circuit denied on February 24, 2005, and a motion for recall of the mandate and reconsideration of the stay denial when the Department indicated it would support such a stay, which recall and stay reconsideration the Tenth Circuit denied on March 4, 2005.

As a result, by letter dated March 11, 2005, the Acting Regional Director of the Bureau of Indian Affairs informed the Tribe that the Bureau will proceed with the termination of all

existing contracts with the Tribe. The Tribe filed an Application to Stay Mandate Pending Certiorari on March 24, 2005, directed to Justice Breyer as Circuit Justice, which Application was denied on March 28.

REASONS FOR GRANTING THE PETITION

If the Tenth Circuit had done no more than void direct federal relations with the chosen government of over 7,000 Native Americans, that alone would have made review by this Court important. That it did so by holding that two of this Court's decisions commanded that result, despite more recent Congressional acts, Executive determinations, and this Court's own *Weeks* decision, makes the importance of review by this Court compelling. That it also ruled in a way that casts into doubt the Secretary's previous recognition of several other tribes underscores this compelling need.

I. THE TENTH CIRCUIT'S HOLDING CONCERNING THIS COURT'S PRIOR DECISIONS IS BOTH WRONG AND IN CONFLICT WITH *WEEKS*.

A. Neither *Journeycake* Nor *Delaware Indians* Held That The Delaware Tribe Had Abandoned Its Tribal Organization.

The Tenth Circuit's fundamental error was its holding that the Department's conclusion that the Delaware Tribe had settled in the Indian Territory under the "preservation option" (option two) of Article 15 of the 1866 Cherokee Treaty was at odds with and foreclosed by this Court's decisions in *Journeycake* and *Delaware Indians*. App. A. at 17a-18a. To begin with, that holding is in conflict with the D.C. Circuit, which reviewed *Journeycake* and *Delaware Indians* and found:

> Neither *Journeycake* nor *Delaware Indians* explicitly addressed whether the Delawares settled in Cherokee territory pursuant to the first or second provision of Article 15.

117 F.3d at 1500. The issue of which provision the Delaware Tribe settled under was in fact not decided in either *Journeycake* or *Delaware Indians*, and accordingly the Tenth Circuit erred

in holding the Department was constrained by these cases in that regard.

The *Journeycake* case could not have determined that the Delawares abandoned their organized tribal status in the 1867 Agreement or in their own 1866 Treaty, because the case concerned the rights and immunities of individuals. *See* 155 U.S. at 204 ("This case hinges on the status of the *individual* Delawares as members and citizens of the Cherokee Nation, and the rights secured to them by the agreement of April 8, 1867.") (emphasis added). At issue was the propriety of a Cherokee decision to limit payment of rental proceeds from land known as the Cherokee Outlet to Cherokees rather than sharing the proceeds with relocated members of the Delaware Tribe, relocated Shawnees, and Cherokee Freedmen, the former slaves of the Cherokee Nation. *See Journeycake*, 155 U.S. at 203-04. The 1866 Cherokee Treaty provided that members of relocating tribes – whether settling pursuant to the "abandonment option" or the "preservation option" – would "enjoy all the rights of native Cherokees." *See* Supp. App. at 45. With the two options providing essentially the same rights and immunities to individuals, the Court had no need to determine under which option the members of the Delaware Tribe had settled. After examining the rights of individuals in the 1867 Agreement, the Court of Claims and this Court both disagreed with the Cherokee Nation's decision to restrict proceeds to Cherokees and held that individual members of the Delaware Tribe were entitled to share in the profits and proceeds from the Cherokee Outlet. 155 U.S. at 211.

Nowhere does *Journeycake* analyze whether the Delaware Tribe abandoned its tribal organization or whether it settled under one option of the 1866 Treaty or the other. The Court's statement that the Delawares were "incorporated" into the Cherokees, 155 U.S. at 216, on which the Tenth Circuit seized, did not determine that the Delaware Tribe settled under option one of Article 15. The Cherokees themselves candidly recognized as much in their own 19th century arguments before the Court of Claims in the

Journeycake case. There, the Cherokees represented to the court that:

> Article 15 of the treaty of 1866, under authority of which the agreement in question is made, is peculiar. It poses *two plans by which friendly Indians may incorporate with the Cherokees.*

C. Add. 101 (emphasis added).

The holding in *Delaware Indians* is similarly circumscribed. The Delaware Tribe brought the case on behalf of both the Tribe and individual Delawares to determine their rights in the Indian Territory lands.[4] In an opinion that presumed the existence of the Delaware Tribe but, like *Journeycake*, addressed only the rights of individuals, the Court held that "Registered Delawares" – members who had relocated from Kansas and were listed on a February 18, 1867, Registry – purchased individual life estates in the amount of 160 acres each rather than land in fee simple. 193 U.S. at 146. The *Delaware Indians* case does not purport to determine the status of the Delaware tribal organization or whether the Tribe settled under the "abandonment" or "preservation" options of Article 15.

Indeed, it could not. As the Court expressly stated in the *Delaware Indians* opinion, its jurisdiction was limited by the act of Congress authorizing the suit. *See* 193 U.S. 128-29. Under the Act of June 28, 1898, the Delaware Indians were authorized to sue the Cherokee Nation "for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation" under the 1867 Agreement. *Id.* at 129. Determining

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4. In addition to the agency's full administrative record, the Northern District of Oklahoma also had before it the Complaint filed by the Delaware Tribe in *Delaware Indians*, in which the Delaware Tribe described its status as that of a tribe residing in the Cherokee Nation and affirmed that its members "have not abandoned their tribal organization but have preserved the same and have maintained their tribal laws, customs, and usages[.]" Complaint at 2, Ninth Averment (certified copy attached to Cherokee Nation of Oklahoma's Motion for Judicial Notice, filed November 2, 2001 in No. 98-CV-903-H(M)).

the tribal organizational status of the Delaware Tribe was not within the jurisdictional grant, beyond which the Court said it would not go. *Id.* at 144.

Thus, when this Court decided *Journeycake* and *Delaware Indians*, it did indeed confirm that certain rights were held by individual Delaware Indians to be treated equally with members of the Cherokee Nation under the 1867 Agreement. But the Court did not determine, in either decision, whether the Delaware Tribe had abandoned its tribal organization. There is no statement in either decision saying that such an abandonment occurred, nor was any conclusion regarding that issue necessary to decide the questions presented in either case. Statements concerning whether members of one tribe had been "incorporated" into the other, or noting that the two tribes were to be "united," on which the Tenth Circuit so heavily relied, do not mean that the Court decided the Delaware had stopped being a recognizable "tribe," any more than the statement that a man and a woman are to be "united" in marriage means that they cease to exist as recognizable individual entities. Such statements simply mean what they say (and no more).

The same is true of the 1867 Agreement, which nowhere says the Delaware Tribe is abandoning its organized tribal status. Nor is that a necessary implication of either the Agreement or the fact of the Delaware Tribe's relocation onto Cherokee lands. That is because, in Indian law, custom, and practice, it is possible to have a tribe (and a tribal government that governs its members with regard to tribal matters) without a specified tribal "territory," *see, e.g.*, Veronica E. Tiller, *Tiller's Guide to Indian Country* (1996) at 229 (discussing landless California tribes), 407 (discussing Chippewa-Cree who were "homeless" prior to 1915), and it is possible to have a tribe that is "united with" or "incorporated into" another tribe, but still retains its own tribal status for its own members (thus, by the Agreement, individual Delaware have all the rights of native Cherokees, but no agreement says individual Cherokee have any status as native

Delawares).[5] For example, the Minnesota Chippewa share a common constitution dating back to 1964 that identifies the Chippewa as a single "tribe," but each of the component bands (*e.g.*, the White Earth Band and the Leech Lake Band) is treated separately by the United States as a tribe. *See* 67 Fed. Reg. 46,328 (July 12, 2002); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106 (1998); *Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 842 (8th Cir. 2003); National Indian Gaming Commission "Gaming Tribes" list.[6] In other instances, separate tribes share the same reservation, such as do the Eastern Shoshone Tribe and the Arapaho Tribe of the Wind River Reservation in Wyoming. *See* 25 U.S.C. § 574a; Tiller, *supra*, at 627.

It is true that the separate 1866 Treaty between the United States and *the Cherokee Nation* contemplates *as one of two possibilities* that a tribe might "abandon their tribal organization," but that only proves the point: that Treaty clearly contemplates that it is left up to a resettling tribe to decide whether or not to abandon its organized status when it moves onto Cherokee lands. To determine if any tribe actually so chose, one needs to look to the specific agreement with that tribe. The Tenth Circuit's eagerness to rely on an "implicit" finding by this Court that the Delawares had abandoned their tribal organization stands in sharp contrast to longstanding principles

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5. Some tribes allow, and the federal government recognizes, "dual enrollment" – enrollment in more than one tribe if an individual meets the requirements of each. *See, e.g.*, 25 U.S.C. § 1903(5). Thus, to say that someone is or is not entitled to be "Cherokee" does not necessarily mean that she has ceased to be "Delaware." Moreover, what the Tenth Circuit termed the "Preservation Option" in the 1866 Cherokee Treaty guaranteed that members of "preserved" tribes "shall enjoy all the rights of native Cherokees." It was thus obviously understood at the time of the 1867 Agreement that a tribe could preserve its identity and its members could nevertheless also have the "rights of native Cherokees."

6. *Available at*: http://www.nigc.gov/nigc/nigcControl?option=GAMING_TRIBES&REGIONID=0 (listing each band separately).

of treaty interpretation[7] and the contemporaneous practice of the period, in which abandonment was expressly stated when it was intended. The Cherokees' 1869 agreement with the Shawnee, for example, drafted two years after the Delaware Tribe's agreement, explicitly states that the Shawnees are abandoning their organized tribal status. *See* C. App. at 321 ("the said Shawnees shall abandon their tribal organization"). No such language, or anything similar, is found in the 1867 Agreement between the Cherokees and Delaware Tribe.

B. This Court Considered Both *Journeycake* And *Delaware Indians* In *Weeks* And Determined That The Delaware Tribe Preserved Its Tribal Identity And Is Federally Recognized.

This Court in *Weeks* duly noted both the *Journeycake* and *Delaware Indians* decisions and nonetheless concluded that despite the Delaware Tribe's relocation and its members' sharing in funds with the Cherokees, the Delawares had preserved their tribal organization and were federally recognized as a tribe:

> Each Delaware moving to Indian Country and enrolling on the proper register was to receive a life estate of 160 acres of Cherokee land and the right to become a member of the Cherokee Nation. Most of the Delawares on the Kansas reservation accepted these conditions and moved to Oklahoma, where they were gradually assimilated for most purposes into the Cherokee Nation, and were permitted to share equally with the Cherokees in the general funds of that tribe. *See, e.g., Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904); *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894). Despite their association with the Cherokees, these Indians, called "Cherokee Delawares" in this suit, have over the

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7. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195-202 (1999) (discussing and applying interpretation principles).

> years maintained a distinct group identity, and they are today a federally recognized tribe.

Weeks, 430 U.S. at 77.

Nor were these statements mere "dicta" on the part of the *Weeks* Court, as the Tenth Circuit erroneously held. One of the arguments being pressed by the appellees in *Weeks* was based on the equal protection component of the Due Process Clause of the Fifth Amendment. *See, e.g.*, 430 U.S. at 82. Those appellees were the so-called "Kansas Delawares," whose ancestors had, as this Court put it, long ago "severed their relations with the tribe," *id.* at 86, and had become "simply individual Indians," *id.* at 85. The *Weeks* Court twice explicitly noted that "[t]heir descendants, called 'Kansas Delawares' in this suit, are not a federally recognized tribe." *Id.* at 78. *See also id.* at 85 ("the Kansas Delawares are not a recognized tribal entity"). The Court used that distinction as the "first" reason why the different treatment of the Kansas Delawares did not offend the equal protection component of the Due Process Clause:

> First, the Kansas Delawares are not a recognized tribal entity, but are simply individual Indians with no vested right in tribal property. . . . As tribal property, the appropriated funds [at issue] were subject to the exercise by Congress of its traditional broad authority over the management and distribution of lands and property held by recognized tribes. . . . We cannot say that the decision of Congress to exclude the descendants of individual Delaware Indians who ended their tribal membership . . . more than a century ago, and to distribute the appropriated funds only to members of . . . the Cherokee and Absentee Delaware tribes, was not 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'

Id. at 85-86.

The sole *dissenter* in *Weeks* argued that this was not a valid distinction, because in his view the "Cherokee Delawares" had also "ceased being members of the Delaware Tribe in 1867, when they joined the Cherokee Nation." 430 U.S. at 94 (Stevens, J., dissenting). But even this dissent, which based its argument on the 1867 Agreement, did not actually claim that the Court had already decided that issue: it merely obliquely asserted that "*[a]spects* of the status of the Cherokee Delawares were adjudicated in *Journeycake* and in *Delaware Indians* . . . ." *Id.* at 94 n.4 (emphasis added). The dissent also did not doubt the current status of the Tribe: In a reference to the fact that the Department had re-approved the Delaware Tribe's governing document in 1974, the dissent stated: "To be sure the Cherokee Delawares have recently reconstituted themselves as a recognized Indian tribe. This did not occur, however, until 1974, two years after Congress acted on the legislation in question." *Id.*

Moreover, and most importantly, these statements were made *in dissent*. They are relevant to show two things: that the question of recognized tribal status *vel non* was not dicta, and that the dissenting view concerning the effect of the 1867 Agreement on that status did not command a majority. The *Weeks* Court, immediately after itself referring to *Journeycake* and *Delaware Indians*, dispatched the "recent recognition" argument in a footnote:

> The formal name of the Cherokee Delawares is the Delaware Tribe of Indians. Appellees contend that the Cherokee Delawares were not a federally recognized tribe until after the commencement of this lawsuit. Tr. of Oral Arg. 58-59. The District Court made no finding as to the Cherokee Delawares' status as a recognized tribe, but it is clear that Congress, prior to the enactment of the statute [at issue], dealt with the Cherokee Delaware as a distinct entity. *See, e.g.*, Act of 1904, s 21, 33 Stat. 222, providing for payments to "the Delaware tribe

> of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . ."; 43 Stat. 812; 44 Stat. 1358; and 49 Stat. 1459, amending 43 Stat. 812.

430 U.S. at 77 n.8.

The Court also stated that the statute at issue, Pub. L. No. 92-456, was an appropriation of "tribal property." 430 U.S. at 85. Examination of the underlying act shows that Congress treated the Delaware Tribe as a recognized tribe, not as an entity "reconstituted for claims purposes," as the Tenth Circuit opined. *Cf.* App. A at 24a. While various Indian groups were eligible to file claims under the Indian Claims Commission Act, the Tribe is unaware of *any* instance in which Congress has made so-called "programming funds" available to an unrecognized, "claims only" tribe. Yet the 1972 act at issue in *Weeks* (like the 1980 act, Pub. L. No. 96-318, 94 Stat. 968 (1980), that followed) expressly allowed the distribution of programming funds to the Delaware Tribe. *See* 25 U.S.C. § 1294(b).

The Tenth Circuit's erroneous holding with regard to the meaning of this Court's *Journeycake* and *Delaware Indians* decisions, and the conflict that holding thereby created with *Weeks*, are of fundamental importance. Coupled with the disastrous consequences for the Delaware Tribe and its members,[8] they would alone provide sufficiently compelling reasons to grant review. But there is more.

II. THE TENTH CIRCUIT SHOULD HAVE DEFERRED TO THE DEPARTMENTS' DELEGATED AUTHORITY AND EXPERTISE REGARDING FEDERAL/TRIBAL RELATIONS.

Both Congress and this Court regard the Department of the Interior as having delegated authority and expertise to administer federal/tribal relations in general and federal recognition of tribes in particular. The Tenth Circuit's decision to prefer its own

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8. *See, e.g.*, Affidavit of Larry Joe Brooks, Chief of the Delaware Tribe of Indians, Appendix G to the Application to Stay Mandate, No. 04A832.

analysis of the 1867 Agreement to the Secretary's interpretation – made on the record after a comprehensive review of the historical documents, confirmed by subsequent legislation and administrative practice – has the effect of reviving (and requiring deference to) a subordinate's decision that the agency has since refuted. It is APA review in reverse, and it is in conflict with this Court's precedents.

Congress has vested the Department of the Interior with broad authority to manage Indian affairs, including authority to determine the effects of agreements and treaties involving tribes. *See* 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457. *See also United States v. Clapox*, 35 F. 575, 577 (D. Ore. 1888) (Secretary has authority to administer treaty). In exercising this authority, the Department's determinations are entitled to considerable deference, as this Court has recognized. *See, e.g., Chevron U.S.A., Inc. v. Nat'l Resources Def. Council*, 467 U.S. 837, 844 (1984) (court should defer to agency interpretation of ambiguous authorities agency is entrusted to administer); *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 184-85 (1982) (deferring to agency interpretation of treaty it negotiated and enforced); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (while courts interpret treaties, meaning given them by agencies particularly charged with their negotiation and enforcement is given "great weight").

The Tenth Circuit gave little heed to such authorities, asserting it could ignore them here because the Department was not directly charged with negotiating or implementing the 1866 Treaties and the 1867 Agreement at issue. *Cf.* App. A at 7a. But that is not correct. Agents of the Department were involved with the Delaware Tribe and the Cherokees throughout, as correspondence from the Delaware Tribe and the Cherokees to the Commissioner of Indian Affairs shows, Supp. App. 53-55, 67-73, and the Secretary of the Interior himself transmitted the 1867 Agreement to the President for signature and wrote the transmittal letter referring to the "uniting" of the two tribes on which the Tenth Circuit itself relied, *cf.* App. A at 22a n.6.

What is more, the issue before the Department in its 1996 final decision was not some interpretation of a general provision of these documents, but whether they should be read as evidencing an abandonment of the Delawares' own tribal organization. Since the very time of these documents, this Court has consistently recognized and deferred to the Department's expertise in the specific area at issue in this case, the recognition of Indian tribes:

> [I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

United States v. Holliday, 70 U.S. 407, 419 (1865), cited with approval in *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *see also Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (question of whether Miamis are a "nation" with which United States might establish relations is akin to political question). Because the Department's 1996 decision was based on its interpretation of the 1867 Agreement, the Treaties referenced in the Agreement, acts of Congress it administers, and over 100 years of its own administrative practice, it deserves deference as an exercise of its delegated authority and accumulated expertise.[9]

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9. The Tenth Circuit stated, erroneously, that the Department's 1996 decision to correct its 1979 position rested "solely" on its interpretation of the 1867 Agreement and the 1866 Cherokee Treaty, see App. A. at 6a, even though the 1996 decision explicitly states "[t]he decision to retract the letter of May 24, 1979, is based on a comprehensive legal analysis of the pertinent treaties and agreements *as well as* a review of the Department of the Interior's administrative practice." 67 Fed. Reg. at 50,863 (emphasis added) (App. F at 74a). Had the Tenth Circuit examined the agency's full record, it would have found that the Department reviewed this Court's cases, acts of Congress, *and* administrative practice before determining that the two-page 1979 decision was erroneous and should be withdrawn. The Tenth Circuit noted that the Department did not rely upon a theory of "restoration" to

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Moreover, an agency decision should also be afforded deference when made in circumstances such as these, where a prior action made by a subordinate without notice, comment, or an adequately articulated basis is corrected after notice and comment and on a substantial record. *See Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (revised interpretation is entitled to deference, so long as agency justifies change with reasoned analysis); *Chevron*, 467 U.S. at 863-64 (agency may consider varying interpretations and wisdom of its policy on a continuing basis). An agency's power to reconsider its own decisions is well-established. *See United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order.").

Rather than deferring to the agency's considered interpretation, confirmed by the historical record, the Tenth Circuit instead substituted its own analysis of the 1867 Agreement. In addition to the flaws already discussed, its review failed to account for the Delaware Tribe's own 1866 Treaty (in which it had expressly asserted its intent to preserve its tribal organization), simply declared "unambiguous" language that did not fit "unambiguously" within the options of the Cherokees' 1866 Treaty,[10] considered the fact of the Delaware Tribe's move as evidence but ignored the duress under which the Tribe found

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determine the status of the Delaware Tribe, *cf.* App. A at 6a n.2, but as the Secretary explained in her supplemental briefing to the Tenth Circuit, that was because the Department found abundant evidence that the Delawares had never relinquished their tribal organization in the first place, which was confirmed by the fact that the United States government, through both its Legislative and Executive branches, continued to deal directly with them as a tribe after 1867. *See* Supp. Brief of Fed. Appellees, at 12 n.4.

10. The Tenth Circuit also stated, erroneously, that the D.C. Circuit found the 1867 Agreement's language to be "unambiguous," *see* App. A. at 19a, when in fact the D.C. Circuit actually said exactly the opposite: "On its face, the language of the 1867 Agreement provides no clear indication as to which of the two Article 15 provisions applies." 117 F.3d at 1500.

itself in 1867 (*see, e.g., Delaware Indians*, 193 U.S. at 141), and refused to consider evidence regarding the Delaware Tribe's contemporary understanding. *See* App. A at 18a-22a.

The end result is that, under the Tenth Circuit's erroneous analysis, it takes less for a tribe to be held to have surrendered its very relationship with the federal government than for it merely to be held to have waived its sovereign immunity in any given instance. Such a notion is contrary to the long-established precedent of this Court.[11] Here, as the Department recognized, the Delaware Tribe indisputably made two payments consistent with the "preservation" option of Article 15 (rather than merely the one payment consistent with the "abandonment" option), nowhere stated it was abandoning its tribal organization, and continued a course of conduct consistent with preservation of its tribal identity (as explicitly recognized by this Court in *Weeks*). Yet the effect of the Tenth Circuit's decision is that the Tribe is held to have waived its government's very existence in an unclear document, interpreted solely with reference to a treaty to which the Delaware Tribe was not a party (the 1866 Cherokee treaty), while under duress. Such a departure from this Court's requirements (for finding waiver, let alone abandonment of government relations), coupled with the devastating effects thereof, would also by itself provide a compelling case for review. But there is still more.

III. THE TENTH CIRCUIT WRONGLY LIMITED THE DELEGATED POWER TO ESTABLISH FEDERAL RELATIONS WITH TRIBES.

The Tenth Circuit also held that the Department violated the law by using a process other than the Part 83 federal acknowledgment regulations to correct its 1979 error and

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11. *See, e.g., C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose. . . . Similarly, to relinquish its immunity, a tribe's waiver must be 'clear'.") *citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), *United States v. Testan*, 424 U.S. 392, 399 (1976), *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991).

reestablish direct relations with the Delaware Tribe. *See* App. A at 25a. This holding does more than contradict the express provisions of Part 83; it needlessly casts into doubt the recognition of many other tribes.

A. The Acknowledgment Regulations Do Not Apply To Tribes Already Recognized By The Federal Government, and Do Not Purport to Govern the Correction of Errors.

Congress has power to regulate Indian affairs and has delegated much of that power to the Secretary of the Interior. *See* 25 U.S.C. §§ 2, 9. *See also Lonewolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning[.]"); *Miami Nation of Indians*, 255 F.3d at 345 (". . . Congress has delegated to the executive branch the power of recognition of Indian tribes[.]"); *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 132 (D.D.C. 2002) (Secretary has authority to determine who will be recognized as tribal representative for purpose of carrying out federal relations with tribe).

In an exercise of this delegated power, the Department promulgated regulations in 1978 to govern certain aspects of the process of recognizing tribes. *See* 43 Fed. Reg. 39,361 (Sept. 5, 1978). The 1978 regulations provided that:

> This part is intended to cover only those American Indian groups indigenous to the continental United States which are ethnically and culturally identifiable, but which are not currently acknowledged as Indian tribes by the Department.

43 Fed. Reg. at 39,362, published at 25 C.F.R. § 54.3(a). The regulations took effect on October 2, 1978. At that time, the Delaware Tribe of Indians was already federally recognized by the Executive branch and the Judicial branch. *See* AR 5 0069-70 ("Governing Bodies of Federally Recognized Indian Groups (Excluding Alaska"); *Weeks*, 430 U.S. at 77 (Delawares "are today a federally recognized tribe."). The regulations were

revised in 1994 but retained the provisions cited above. *See* 59 Fed. Reg. 9280, 9294 (Feb. 25, 1994).

The Part 83 procedures do not purport to address the correction of administrative errors. Rather, they set forth a detailed process for tribes to establish, as an initial, factual matter, that they are tribes. *See, e.g.*, 25 C.F.R. § 83.7.[12] Nor does the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, purport to limit the Department's power to correct errors. As substantive law, it merely requires the Secretary to publish an annual list of the recognized tribes. *Id.* at § 104, 25 U.S.C. § 479a-1. Although in its "findings" it notes that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 . . . ; or by a decision of a United States court;" *id.* at § 103(3), those "findings" do not have the force of law[13] and do not in any event purport to be an exhaustive description of the Department's delegated powers or a limitation on its recognized ability to correct its own errors. Indeed, the same Congress which passed the List Act also added provisions to Title 25 which prohibit the Department from maintaining in effect any determination that diminishes the privileges available to any one tribe relative to those available to others. *See* 25 U.S.C. 476(g); Pub. L. 103-263, § 5(b).

The Department was thus well within its discretion to act outside of Part 83 when it determined, after a comprehensive review conducted with notice and the opportunity for comment, that it erred in 1979 when it purported to end direct, government-to-government dealings with the Delaware Tribe. First, the Delaware Tribe's status as a tribe and its distinct tribal identity were never an issue, as even the 1979 letter stated. *See* C. App.

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12. The process requires a petition to show conformance with seven specific criteria, using 35 kinds of evidence. 25 C.F.R. § 83.7. The regulations provide a lengthy timeline for decision. *See* 25 C.F.R. § 83.10.

13. *See, e.g., National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1996) ("statement of congressional findings is a rather thin reed upon which to base a requirement . . . neither expressed nor, we think, fairly implied in the operative sections of the Act.").

499 ("the Cherokee Delawares *are a tribe* within the Cherokee Nation. . . . [f]or *governmental* purposes, however, they must look to the Cherokee Nation.") (first emphasis added, second in original). Second, the Department's review showed that its 1979 decision to "retract" direct relations (and its companion decision to remove the Delaware Tribe from the list of federally recognized tribes in 1979) was invalid and therefore void *ab initio*, having never affected the Delaware Tribe's prior status. *See* Supp. App. 383 (1996 Letter to Cherokee Nation). *Cf.* H.R. Rep. No. 103-781, at 3, *reprinted in* 1994 U.S.C.C.A.N. 3768, 3769 (legislative history of List Act) (noting Department "does not have authority to 'derecognize' a tribe").

Finally, requiring the Delaware Tribe to go through Part 83 procedures would have been the least equitable and expedient way[14] to correct an erroneous decision found to be "striking both for the superficiality of its analysis and for the sweeping impact of its conclusions." *See* App. B at 44a. Agencies retain inherent power to correct their decisions and are afforded the discretion to interpret their regulations to determine the best means to act. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) (giving great deference to Secretary's interpretation of regulation particularly when made by those charged with "making the parts work efficiently, and smoothly[.]"); *Dun & Bradstreet Corp. Foundation v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991) (power to reconsider may be exercised at agency's initiative regardless of whether statute and regulations expressly provide for such review).

B. The Tenth Circuit's Pronouncement That The Department May Act Only Pursuant To Part 83 Casts Doubt On The Status Of Other Tribes.

The issues in this case are made even more compelling by the Tenth Circuit's declaration that the Department erred in using

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14. The General Accounting Office estimated that in 2001, 26 completed petitions awaited action by the BIA, which could take 15 years to resolve, even though the regulations contemplated a two-year process. *See* GAO Report No. 02-49, Indian Issues: Improvements Needed in Tribal Recognition Process, at 5, 10 (Nov. 2001).

a procedure outside of Part 83. According to the General Accounting Office, the federal acknowledgment procedures were "never intended to be the only way groups could receive recognition." *See* GAO Report No. 02-49 at 19.[15] The report notes that at least six other tribes have been "recognized" through various administrative procedures after the Part 83 process was established but outside of that process. *See id.* at 21. The Tenth Circuit's pronouncement that Part 83 applies to the Department's reaffirmation of direct relationships with tribal entities that the United States has dealt with as tribes and that have functioned as self-governing sovereigns thus has troubling implications that reach far beyond this case.

* * *

This Court has regularly acknowledged the importance of the principles of tribal self-governance, sovereignty, and independence, and has made plain its reluctance to let courts second-guess the Executive in tribal affairs. *See, e.g., United States v. Lara*, 541 U.S. 193, 205 (2004) (prior decisions make clear Constitution does not dictate "metes and bounds" of tribal autonomy and do not suggest courts should "second-guess the political branches' own determinations."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987); *White Mountain Apache v. Bracker*, 448 U.S. 136, 143-44 (1980). The Tenth Circuit, however, has taken the unprecedented step of voiding an Executive decision to establish direct federal relations with a tribe. And not just any tribe, but one which has been in government-to-government relations with the United States going back to 1778, which Congress has repeatedly referred to as a "tribe" in multiple Acts awarding the type of programming funds

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15. When it remanded the case following its Rule 19 ruling, the D.C. Circuit also recognized that the Part 83 procedures were not exclusive, noting that direct relations with the Delaware Tribe might be reestablished by the Department following its 1979 error "either by means of the Final Decision, the Part 83 procedures, or another method." 117 F.3d at 1503.

that only "recognized" tribes receive, and that this Court itself found was "a federally recognized tribe." The Delaware Tribe of Indians respectfully submits that the decision of the Tenth Circuit merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED NOVEMBER 16, 2004

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 03-5055

CHEROKEE NATION OF OKLAHOMA,
on behalf of all its members,

Plaintiff-Appellant,

v.

GALE NORTON, Secretary of the United States Department of the Interior, AURENE MARTIN, Acting Assistant Secretary of the United States Department of the Interior, and DELAWARE TRIBE OF INDIANS,

Defendants-Appellees.

Nov. 16, 2004.
As Amended on Denial of Rehearing Feb. 16, 2005.

Before **SEYMOUR**, **BALDOCK**, and **HARTZ**, Circuit Judges.

BALDOCK, Circuit Judge.

The Cherokee Nation of Oklahoma ("Cherokee Nation") and Delaware Tribe of Indians ("Delawares") entered into a contract pursuant to a treaty negotiated between the Cherokee

Nation and the United States Government. The Supreme Court has twice interpreted that contract. We must decide in this case whether the Department of Interior's ("DOI") interpretation of that contract and concomitant decision to extend Federal recognition to the Delawares is contrary to the Supreme Court's reading of the same document.

I.

The law governing Federal recognition of an Indian tribe is, today, clear. The Federally Recognized Indian Tribe List Act of 1994 provides Indian tribes may be recognized by: (1) an "Act of Congress;" (2) "the administrative procedures set forth in part 83 of the Code of Federal Regulations[;]" or (3) "a decision of a United States court." Pub. L. No. 103-454, § 103(3), 108 Stat. 4791; *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547-48 (10th Cir. 2001). A recognized tribe is placed on the DOI's "list of recognized tribes[.]" 25 U.S.C. §§ 479a(3), 479a-1; 25 C.F.R. § 83.5(a).

The Delawares had never been on the list prior to this lawsuit. The Delawares began a quest for Federal recognition in 1992. They submitted a letter to the DOI expressing an intent to petition for Federal acknowledgment under the "Part 83 procedures." *See* 25 C.F.R. §§ 83.1, 83.4. The DOI informed the Delawares it would not consider their petition. The agency explained the "Delawares have not existed as an independent political identity since 1867, and have been absorbed into the Cherokee Nation of Oklahoma for general governmental purposes since that time." The Delawares, in response, requested instructions for filing an appeal. The DOI

thereafter reaffirmed its position, but "clarified" its previous non-appealable advisory letter did not prevent the Delawares from petitioning under the Part 83 procedures.

The Delawares never formally petitioned for acknowledgment. Instead, they requested the DOI to "reconsider and retract" the agency's position, as expressed in a 1979 letter, that it would only engage in government-to-government relations with the Delawares through the Cherokee Nation. The agency conducted a "legal review" of the situation at the Delawares' behest. The DOI concluded the 1979 position should be retracted and published a "notice of intent" to do the same. *See* 61 Fed. Reg. 33,534-35 (June 27, 1996). The DOI elected not to follow the Part 83 procedures because they do not apply to "already acknowledged" tribes; and under the agency's new position, the Delawares had been acknowledged since 1867. *See* 25 C.F.R. § 83.3(b). The agency issued its final decision, after notice and comment, in September 1996. *See* 61 Fed. Reg. 50,862-63 (Sept. 27, 1996). The final decision declared "the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian Tribe." *Id.* at 50,863.

On October 2, 1996, the Cherokee Nation sued the DOI. *Cherokee Nation of Okla. v. Babbitt*, 944 F. Supp. 974 (D.D.C. 1996). The Nation alleged the agency violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, when it extended recognition to the Delawares. The district court, upon the DOI's motion, dismissed the suit because the Delawares were an indispensable party that could

not be joined because of sovereign immunity. *Cherokee Nation*, 944 F. Supp. at 986. The D.C. Circuit reversed, holding the Delawares could not assert sovereign immunity because they relinquished their tribal sovereignty when they entered into an agreement with the Cherokee Nation in 1867. *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1503 (D.C. Cir. 1997). The D.C. Circuit, however, limited its holding to the joinder issue and remanded the case for the district court to decide the "proper interpretation of the 1867 agreement with the Delaware Tribe[ ] as a party to the proceedings and in light of the full administrative record[.]"[1] *Id.* at 1503 n.15. On remand, the district court transferred the case to the Northern District of Oklahoma because it lacked personal jurisdiction over the Delawares.

There, the district court extended "great deference" to the DOI and concluded its retraction of the 1979 letter did not violate the APA. *Cherokee Nation of Okla. v. Norton*, 241 F. Supp. 2d 1368, 1373-74 (N.D. Okla. 2002). The court reasoned the Delawares were a federally recognized tribe prior to 1979 because (1) a claims statute appropriated funds to the "Delaware Tribe of Indians," and (2) "the Supreme Court explicitly and unambiguously declared that the Delaware Tribe of Indians was a federally recognized Indian tribe in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977)." *Id.* at 1372-73. The court therefore did not consider the initial 1867 agreement entered into between the Cherokee Nation and Delawares. *Id.* at 1372.

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1. The D.C. Circuit's opinion is not the law of the case because the court did not reach the merits of the Cherokee Nation's claim. *See United States v. Hatter*, 532 U.S. 557, 566 (2001).

Appendix A

The Cherokee Nation appeals. We have jurisdiction, 28 U.S.C. § 1291, and "afford no particular deference to the district court's review of [the] agency['s] action; our review of the administrative record pertaining to the challenged action is independent." *Pennaco Energy Inc. v. United States Dep't of the Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004) (internal quotations and citation omitted). Because the DOI's final decision is contrary to Supreme Court precedent and the Federally Recognized Indian Tribe List Act, we reverse.

II.

The APA requires an agency to articulate a satisfactory explanation for its action. *Kansas v. United States*, 249 F.3d 1213, 1228-29 (10th Cir. 2001). Agency action *must* be upheld, if at all, on the basis the agency articulated. *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974); *Pennaco Energy Inc.*, 377 F.3d at 1157. An agency's action, on the other hand, may be set aside under the APA if it is arbitrary, capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2)(A). "And the Act has been interpreted . . . to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations[.]" *Miami Nation of Indians of Ind., Inc. v. United States Dep't of the Interior*, 255 F.3d 342, 348 (7th Cir. 2001); *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002). Furthermore, although the APA's arbitrary and capricious standard is ordinarily a deferential one, *see id.* at 1164, such deference is not unfettered nor always due. *See General Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, __, 124 S. Ct. 1236, 1248 (2004) (explaining no deference is owed to a clearly wrong agency

interpretation); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649-50 (1990) *superceded by* 29 U.S.C. § 1854 (explaining a precondition to agency deference is a congressional delegation of administrative authority); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (explaining an agency interpretation that conflicts with an earlier interpretation is entitled to considerably less deference than a consistently held position).

In this case, the DOI based its final decision on a "legal analysis of the pertinent treaties and agreements as well as a review of [its] administrative practice." 61 Fed. Reg. at 50,863. More specifically, the agency's recognition of the Delawares was based solely on its *analysis of the treaties and agreements* entered into by the Cherokee Nation and Delawares in the 1860s. The DOI's "review" of its administrative practice over the next century was simply to confirm the Delawares' status. The DOI does *not* maintain its administrative practice from 1867 to 1979 "reconstituted" or "restored" the Delawares as a tribe.[2] The resolution of

2. The Delawares have advanced an alternative "restoration" argument. They assert the "modern-era record alone is more than sufficient to sustain the [DOI's] 1996 decision, even if this Court were to disagree with the [DOI's] interpretation of the historical documents in this case." The district court ostensibly relied on a restoration theory to sustain the DOI's decision. *See Cherokee Nation*, 241 F. Supp. 2d at 1372-74. The district court erred because the DOI did not articulate "restoration" as a basis for its final decision. *See Texaco*, 417 U.S. at 397; *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Further, the DOI conceded at oral argument its position rested solely on a theory that the Delawares preserved their tribal identity when

(Cont'd)

this case thus turns on the status of the Delawares under the treaties and the agreements entered into by the Cherokees and Delawares in the 1860s. We do not afford any deference to the DOI's position on this issue because Congress did not give it the discretion to administer those treaties and agreements. *Adams Fruit Co.*, 494 U.S. at 649; *Citizen Band of Potawatomi Indian Tribe of Okla. v. Collier*, 142 F.3d 1325, 1332 (10th Cir. 1998); *see also Cherokee Nation*, 117 F.3d at 1499. We now turn to those treaties and agreements.

III.

The history of the Delawares' tortured migration westward has been told elsewhere, *see Weeks*, 430 U.S. at 75-79 & n.2, and we need not repeat it. Suffice it to say, the "main body" of Delawares resided on a reservation in Kansas in the 1850s. *Id.* at 77. Notwithstanding promises to the contrary, *see id.*, the United States sought to move the Delawares again in 1866. To that end, the United States entered into a treaty with the Delawares. *Treaty with the Delawares*, July 4, 1866, U.S.-Del. Indians, 14 Stat. 793 ("1866 Delaware Treaty"). The 1866 Delaware Treaty provided, among other things, the Delawares could purchase from the United States "a tract of land ceded to the Government by the Choctaws and Chickasaws, the Creeks, or the Seminoles, or which may be ceded by the Cherokees

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(Cont'd)

they relocated to the Cherokee Nation. We therefore decline to consider the Delawares' "restoration" argument because the issue is not properly before the court. We leave for another day what effect, if any, the post-1867 legislative and executive dealings with the Delawares had on their alleged status as a tribe. *See infra* at 23 [App. A at 6a n.2].

in the Indian country [now Oklahoma], to be selected by the Delawares in one body in as compact form as practicable[.]"

The United States subsequently entered into a treaty with the Cherokee Nation. *Treaty with the Cherokee*, July 19, 1866, U.S.-Cherokee Nation, 14 Stat. 799 ("1866 Cherokee Treaty"). Article 15 of the 1866 Cherokee Treaty provided an "incorporation option" and "preservation option" for friendly Indians settling upon Cherokee lands:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz:
>
> [*Incorporation Option*] Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be *incorporated into* and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens.

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[*Preservation Option*] And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a *district of country set off for their use by metes and bounds* equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and

> [1] shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States....
>
> [2] And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees.

(emphasis added).

Appendix A

On April 8, 1867, the Cherokee Nation entered into "Articles of Agreement" with the Delawares ("1867 Agreement") pursuant to Article 15 of the 1866 Cherokee Treaty. The preamble to the 1867 Agreement provides the Cherokee Nation and Delawares held a "full and free conference . . . looking to a location of the Delawares upon the Cherokee lands, *and* their *consolidation* with said Cherokee Nation[.]" (emphasis added). The agreement provided for both conditions.

The Cherokee Nation first "agree[d] to sell to the Delawares, for their *occupancy*, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres of land for each [registered] individual of the Delaware Tribe . . . [with] the selections of the lands to be purchased . . . made by said Delawares in *any part* of the Cherokee reservation east of said line of 96°[.]"[3] (emphasis

3. The Delawares sent a delegation to the Cherokee Nation in October 1866 for "the purpose of selecting a new home for their people [.]" The delegation did not locate any suitable land west of the 96° meridian, but did find a satisfactory ten-by-thirty mile tract east of the 96° meridian. John Connor, principal chief of the Delawares, thereafter sent a letter to William P. Ross, principal chief of the Cherokee Nation, explaining the delegation had found a suitable tract of land the Delawares could settle upon to preserve their tribal organization under the 1866 Cherokee Treaty. The letter requested the matter be presented to the Cherokee National Council for final action. No evidence exists showing the matter was ever proposed to the council. Instead, the Delawares sent a delegation, of which John Connor was a part, to Washington D.C. to perfect the arrangement for relocating the Delawares to the Cherokee Nation. There, the Delaware delegation entered into the 1867 Agreement, which the President approved as the agreement and 1866 Cherokee Treaty required.

added). The Delawares paid $157,600 (one dollar per acre) for such occupancy rights and a preferred allotment position. The "Delawares further agree[d], that there shall be paid . . . a sum of money, which shall sustain the same proportion to the existing Cherokee National fund, that the number of Delawares registered as above mentioned, and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation." The Delawares paid $121,824.28 into the Cherokee national fund based on the formula recited in the agreement. The 1867 Agreement concluded:

> On fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, *shall* become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other,) in the national funds, as *native* Cherokees, save as hereinbefore provided. And the children hereafter born of *such Delawares so incorporated* into the Cherokee Nation, shall in all respects be regarded as *native Cherokees.*

(emphasis added).

The 1867 Agreement was "subject to the approval of the President of the United States[.]" The Secretary of the DOI, then Orville H. Browning, transmitted the agreement to the President. Secretary Browning's transmittal letter explained the agreement "provid[ed] for *uniting the two tribes*, as contemplated by the Cherokee Treaty of July 19th 1866" and "recommend[ed] that it be approved." (emphasis added).

President Andrew Johnson approved the agreement. The registered Delawares fulfilled all of the stipulations in the 1867 Agreement and moved onto selected 160-acre tracts scattered throughout the Nation.

IV.

The genesis of the present case is the DOI's 1996 decision to extend Federal recognition to the Delawares based on its legal analysis of the 1866 Cherokee Treaty and 1867 Agreement. The agency concluded the agreement evidenced the Delawares' election of the treaty's "preservation option" because it required two payments (whereas the incorporation option only required one) and Delawares made two payments ($157,600 and $121,824) to the Cherokee Nation. The DOI therefore maintains the Delawares preserved their tribal identity when they moved to the Cherokee Nation in the 1860s.

We do not begin with a clean slate. In fact, *every court* to consider the actual terms of the 1866 Cherokee Treaty and 1867 Agreement has explicitly or implicitly rejected the DOI's reading of the agreement. *See Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 311 (1893) *aff'd as modified* 155 U.S. 196 (1894) (holding that under the 1867 Agreement "two independent bodies politic united and became one, the lesser, according to its terms, being merged into the greater."); *Cherokee Nation v. Journeycake*, 155 U.S. 196, 210-11 (1894) (holding that under the 1867 Agreement the "Delawares became incorporated into the Cherokee Nation, and are members and citizens thereof[.]"); *Delaware Indians*

v. Cherokee Nation, 38 Ct. Cl. 234, 256 (1903) *aff'd* 193 U.S. 127 (1904) (holding that "[b]y the introduction and admission of the Delawares as part of the Cherokee Nation they became a part of the people of such nation and bound in common with the Cherokees by the political power of the nation [.]"); *Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 135 (1904) (reaffirming the purpose of the 1867 Agreement was "to incorporate the registered Delawares into the Cherokee Nation, with full participation in the political and property rights of citizens of that nation."); *Cherokee Nation*, 944 F. Supp. at 982 *rev'd on other grounds* 117 F.3d 1489 (D.C. Cir. 1997) (holding the "Delaware[s] settled in Cherokee Nation territory pursuant to the first provision of Article 15, under which the settling Delaware became full and equal Cherokee Nation citizens."); *Cherokee Nation*, 117 F.3d at 1503 (holding that "by entering into the 1867 Agreement the Delaware Tribe of Indians relinquished its tribal identity or sovereignty in relation to the Cherokee Nation."). We now join them.

A.

In *Journeycake*, 155 U.S. at 196, the Supreme Court considered a dispute between the Delawares and Cherokee Nation over the proper distribution of national funds. The Cherokee National Council had directed certain rent proceeds be distributed to "native Cherokees," to the exclusion of Delawares. The Delawares filed suit in the court of claims, alleging the Cherokee Nation's discriminatory distribution of the rental proceeds violated the 1867

Agreement.[4] The case therefore "hinge[d] on the status of the individual Delawares as members and citizens of the Cherokee Nation, and the rights secured to them by the agreement of April 8, 1867." *Id.* at 204.

The Court, after reviewing the 1866 Cherokee Treaty and 1867 Agreement, easily concluded that because "the registered Delawares have become incorporated into the Cherokee Nation, and are members and citizens thereof, it follows necessarily that they are, equally with the native Cherokees, the owners of, and entitled to share in the profits and proceeds of, [the leased] lands." *Id.* at 210-11. The Court rejected the Cherokee Nation's arguments to the contrary based on the "plain import of the language used in the [1867] agreement[.]" *Id.* at 216. The agreement's language compelled the Court to "conclude that by such agreement the Delawares became incorporated into the Cherokee Nation,

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4. As a result of disputes arising between the Delawares and Cherokee Nation over the proper distribution of monies from the Cherokee national fund, *see* Act of October 19, 1888, Chap. 1211, 25 Stat. 608, Congress enacted a statute providing the court of claims with jurisdiction "to determine ... the just rights in law or in equity of the . . . Delaware Indians, who are settled and incorporated into the Cherokee Nation[.]" Act of October 1, 1890, Chap. 1249, § 1, 26 Stat. 636. The Act provided the Delawares with a private cause of action, "either separately or jointly," against the Cherokee Nation and "[t]hat the said suit or suits may be brought in the name of the principal chief or chiefs of the said . . . Delaware Indians[.]" *Id.* §§ 2-3. Charles Journeycake, principal chief of the Delawares, filed suit under the Act on behalf of the Delawares. *See Journeycake*, 28 Ct. Cl. at 319 (decreeing the rights "of the Delaware Indians who are settled and incorporated into the Cherokee Nation"); *see also* C.A. Weslager, *The Delaware Indians: A History* 447 (1972) (explaining Journeycake was "authorized and empowered" to represent the Delawares in court).

became members thereof, and, as such, entitled equally with the native Cherokees to all their rights in the reservation and [leased lands]." *Id.*

In so holding, the Court considered evidence of the Delawares' two payments to the Cherokee Nation, *id.* at 203, and specifically analyzed the Delawares' purchase of land occupancy rights. *Id.* at 212-15. The Court nevertheless found the 1867 Agreement expressed the parties' intent to incorporate the Delawares for two reasons. First, the parties did not provide for the "setting apart of a distinct body of land in any portion of the reservation for the Delaware tribe[.]" *Id.* at 205. The Court explained the Delawares' failure to purchase a "distinct body of lands" was inconsistent with the settlement of "*tribes as tribes* within the limits of the Cherokee Nation." *Id.* at 213 (emphasis added). Second, the Delawares did not purchase their lands in fee simple, *see id.* at 212, 214-15, but instead acquired occupancy rights in kind with all Cherokees and a preferential allotment position. *Id.* at 213. "All this was in the line of the expressed thought of a consolidation of the[] Delawares with, and absorption of them into, the Cherokee Nation as individual members thereof." *Id.*

Subsequently, in *Delaware Indians*, 193 U.S. at 127, "the Delaware Indians residing in the Cherokee Nation, *as a tribe and individually*, . . . su[ed] . . . for the purpose of determining the right of the Delaware Indians in and to the lands and funds of [the Cherokee] nation under the contract and agreement . . . dated April 8, 1867." *Id.* at 129 (emphasis added) (internal quotation and citations omitted); *see also* Act of June 28, 1898, Chap. 517, § 25, 30

Stat. 495, at 504. The Court first rejected the Delawares' claim that the 1867 Agreement secured to them, as a tribe, their selected lands east of the 96° meridian. *Delaware Indians*, 193 U.S. at 134-35. The Delawares' argument failed because it was contrary to the Court's *holding* in *Journeycake* and inconsistent with their purchase of occupancy rights, which were "conferred *not* upon the Delaware Nation, but upon certain registered Delawares who [were] incorporated into the Cherokee Nation." *Id.* at 135 (emphasis added).

The Court also rejected the Delawares' argument that they individually owned their selected tracts in fee simple. The Court explained the adult Delawares had only purchased occupancy rights in the Cherokee lands under the 1867 Agreement. Furthermore, the agreement provided "'the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall, in all respects, be regarded as native Cherokees.'" *Id.* at 138. The Court found

> [t]his provision is *utterly inconsistent* with the grant of an estate in the lands to survive the 'occupancy' of the registered Delawares. Such children are to have the rights of native Cherokees, and no more. Their parents were incorporated into the Cherokee Nation with certain specific rights; the children were to stand upon an equality with their adopted brethren of the Cherokee blood.

Id. (emphasis added). The Court accordingly held the Delawares only obtained life estates in their lands selected under the 1867 Agreement. *Id.* at 143.

The Delawares nevertheless insisted the 1867 Agreement "should not be literally enforced in view of the understanding of the parties[ ]" and sought to introduce parol evidence. *Id.* at 140. The Court, however, found the contract unambiguous and rejected the Delawares' resort to parol evidence. *Id.* at 140-42. The Court explained "no room" existed in the case to "depart[ ] from the familiar rules of law protecting written agreements from the uncertainties of parol testimony." *Id.* at 141. "In light of the circumstances and the language used in the writing, its construction [was] not rendered difficult because of latent ambiguities." *Id.* The Delawares were therefore entitled to their occupancy and preferential allotment rights, but "[i]n all other respects *the Cherokee citizens, whether of Delaware or Cherokee blood,* should be given equal rights in the lands and funds of the Cherokee Nation." *Id.* at 146 (emphasis added).[5]

B.

Based on the foregoing, the DOI's conclusion the Delawares preserved their tribal identity under the 1866

5. The D.C. Circuit concluded in this case the Delawares were not entitled to assert sovereign immunity. *Cherokee Nation*, 117 F.3d at 1503. Relying on *Journeycake* and *Delaware Indians*, the D.C. Circuit held the Delawares relinquished their tribal sovereignty in relation to the Cherokee Nation because the two tribes consolidated into a single unit under the 1867 Agreement. *Id.* at 1501-03. The court explained the Delawares' two payments to the Cherokee Nation was consistent with their election to settle under the 1866 Cherokee Treaty's incorporation option. Furthermore, the parties' "use of the term 'incorporated' in the 1867 Agreement [was] sufficiently unambiguous to constitute an express relinquishment of the Delawares' status as a separate sovereign." *Id.* at 1501.

Cherokee Treaty and 1867 Agreement is *clearly* contrary to Supreme Court precedent. The "rights adjudicated" in *Journeycake* and *Delaware Indians* "turned upon the construction of the agreement of April 8, 1867, and its nature and the history of the events which led up to its execution[.]" *Delaware Indians*, 193 U.S. at 134. The Court held the unambiguous language of the 1867 Agreement provided for the Delawares' incorporation into the Cherokee Nation with their children taking only the same rights as other citizens. *Id.* at 143; *Journeycake*, 155 U.S. at 216. We are "bound by the Supreme Court's interpretation of that Agreement in *Journeycake* and *Delaware Indians*." *Cherokee Nation*, 117 F.3d at 1500; *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). "An agency also *must* conform its conduct to a decision of the Supreme Court in all future cases, even if the agency believes that the Court was wrong." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.9, at 129 (2002) (emphasis added).

Our task is therefore simple. Although we seek to avoid engaging in a repetitive analysis of the 1866 Cherokee Treaty and 1867 Agreement—an analysis the Supreme Court has twice engaged in—we again explain why the Delawares did not preserve their tribal identity under those documents. The 1866 Cherokee Treaty provided for the settlement of Indians within the Cherokee Nation. The terms the tribes agreed upon for such settlement, however, had to be "consistent" with one of the options provided in Article 15 of the 1866 Cherokee Treaty. The unambiguous language of the 1867 Agreement, including the provisions for the Delawares' two payments, is consistent with the Delawares' selection of the incorporation option of Article 15. Specifically, the

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Delawares made a proportional payment of $121,824 into the national fund and provided they were consolidating with and incorporating into the Cherokee Nation. That the Delawares made an additional payment of $157,600 for land occupancy and preferential allotment rights is not inconsistent with the incorporation option. In contrast, and for the reasons detailed below, the language of the agreement and the nature of its execution are inconsistent with Article 15's preservation option.

To begin, the 1867 Agreement describes the Delawares consolidation with or incorporation into the Cherokee Nation three times. We agree with the Supreme Court (as we must) and the D.C. Circuit that the agreement's language is unambiguous. *Delaware Indians*, 193 U.S. at 141; *Cherokee Nation*, 117 F.3d at 1501. "Consolidation" and "incorporation" carried the same meanings in 1867 as they do today: to unite. *Compare Webster's Dictionary of the English Language* 279 (consolidate), 677 (incorporate) (1864) *with Webster's Third New International Dictionary* 484 (consolidate), 1145 (incorporate) (1981). The DOI nevertheless concluded "the Agreement uses the language 'consolidation' in the context of the physical location of the Delaware from Kansas to Cherokee country, not in the context of governmental purposes." The agency's reading is, however, inconsistent with the plain language of the 1867 Agreement, which provides the parties were "looking to a location of the Delawares upon the Cherokee lands, *and* their consolidation with said Cherokee Nation[.]" (emphasis added). With respect to "incorporation," the DOI suggests the language can be read consistent with Article 15's preservation option. Perhaps. The problem is the Supreme Court specifically

rejected the DOI's reading in *Delaware Indians*. There, the Court explained the "Delawares *were made part of the Cherokee Nation* " and became "a *component part* " of the nation "on equal terms with other citizens." *Delaware Indians*, 193 U.S. at 144 (emphasis added). Furthermore, the agreement provides Delaware children shall be regarded as *native Cherokees*. Such a provision is wholly inconsistent with the "preservation" of tribal identity. *See Cherokee Nation*, 117 F.3d at 1502.

Next, as the Supreme Court explained, the 1867 Agreement is important for what it does not contain. Article 15's preservation option contains the mandatory condition that tribes settling under it "*shall* have a district of country set off for their use by metes and bounds[.]" (emphasis added). In *Journeycake*, 155 U.S. at 205, 213, the Court twice mentioned the agreement's crucial omission of a "provision for the setting apart of a distinct body of lands" to support its *holding* the Delawares "became incorporated into the Cherokee Nation[.]" *Id.* at 216.

In this appeal, the Delawares (and to a lesser extent the DOI) advance the novel theory they actually selected and settled upon a ten-by-thirty mile tract of land in the Cherokee Nation. Absolutely nothing in the administrative record supports the Delawares' theory. *See supra* n.3. Instead, the 1867 Agreement "contemplate[d] personal selection of separate tracts by individual Delawares." *Journeycake*, 155 U.S. at 205. The agreement's language could not be more clear: "the selections of the lands to be purchased by the Delawares, may be made by said Delawares in *any part* of the Cherokee reservation east of said line of 96°[.]" (emphasis

added). The evidence in the administrative record demonstrates the Delawares did, in fact, select individual tracts of lands for their homes throughout the reservation. That some, or even "most," Delawares selected their tracts in the Cooweescoowee district of the reservation is immaterial.

Most importantly, the DOI's theory that the Delawares' two payments to the Cherokee Nation evidences "preservation" rather than "incorporation" is misguided. In *Journeycake*, 155 U.S. at 203, the Court was aware of the payments and did not express any disagreement with the finding that the Delawares' proportional payment into the national fund was not "susceptible of misconstruction and concerning it no controversy has arisen." *Journeycake*, 28 Ct. Cl. at 307. The Court then based its decision on the land purchase payment. In fact, the Court considered the Delawares' purchase of land occupancy rights indicative of their intent to incorporate. *Journeycake*, 155 U.S. at 212-13. Further, the Court reaffirmed *Journeycake's* holding and reasoning in *Delaware Indians*, 193 U.S. at 143, when it concluded the Delawares only purchased life estates in the Cherokee lands. The Delawares' purchase of life estates in scattered tracts throughout the Cherokee Nation is inconsistent with the actions of a people seeking to "preserve" their tribal identity.

The DOI and Delawares also argue the 1867 Agreement is ambiguous and urge us to consider parol evidence. We decline for three reasons. First, the admission of parol evidence is improper because the 1867 Agreement is unambiguous. *See Richardson v. Hardwick*, 106 U.S. 252,

254 (1882); *Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 311 (1886). Second, we cannot tell the Supreme Court that it incorrectly concluded the agreement did not suffer from any ambiguities requiring the consideration of parol evidence. *Delaware Indians*, 193 U.S. at 141; *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) (explaining that "unless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). Third, and *assuming* for the moment the agreement is ambiguous (which it is not) and the Supreme Court had not held it unambiguous (which it did), the Delawares would still not be in any better position. The parties' contemporaneous actions evidenced their belief the Delawares incorporated into the Cherokee Nation.[6] *See Journeycake*, 155 U.S. at 216-17.

6. For example, then-Secretary Browning described the 1867 Agreement as providing for the uniting of two tribes. *See also Delaware Indians in Cherokee Nation—Allotment*, 25 Pub. Lands Dec. 297, 301-302 (Dep't of Interior 1897). The Delaware delegation that entered into the 1867 Agreement represented to the Commissioner of Indian Affairs that the Delawares had "merged" themselves into the Cherokee Nation. The Delaware Council, then in Kansas, recognized their delegation had entered into an agreement providing for the "incorporation or merging" of the tribe into the Cherokee Nation and protested the same. Despite the original dissension, the Delawares ultimately moved to the Cherokee Nation and began, as described in *Journeycake*, receiving per capita distributions from the Cherokee national fund as citizens. "[T]he first manifestation of a claim of difference between the native Cherokees and the registered Delawares as to the extent of their interests in the lands or the proceeds thereof" did not occur until 1883. *Journeycake*, 155 U.S. at 216-17.

We finally note the DOI's and Delawares' reliance on *Weeks* is misplaced. In *Weeks*, 430 U.S. at 75, the Supreme Court considered whether a claims statute excluding the "Kansas Delawares"—the Delaware Indians who remained in Kansas under the 1866 Delaware Treaty—from the statutory distribution of a claims award violated the Equal Protection Clause. The Court commented that "[d]espite their association with the Cherokees, these Indians, called 'Cherokee Delawares' in this suit, have over the years maintained a distinct group identity, and they are today a federally recognized tribe." *Id.* at 77 & n.8. The Court's dicta, *see Cherokee Nation*, 117 F.3d at 1502, indicated Congress' distribution of a claims award to the "Delaware Tribe of Indians," *see* Act of April 21, 1904, Chap. 1402, § 21, 33 Stat. 189, at 222, was sufficient to recognize the Delawares as a tribe for the limited purpose of the claims statute at issue in that case. *Weeks*, 430 U.S. at 77 n.8; *see also id.* at 94 (Stevens, J., dissenting). As Cohen's handbook on Federal Indian law explains:

> The question whether a group is a tribe for purposes of statutes allowing claims to be asserted against the United States has arisen many times. Where several Indian groups are generally considered a single tribe for political and administrative purposes, Congress may nevertheless assign tribal status to portions of the tribe for claims purposes. For example, Tribe A and Tribe B have combined to form Tribe C and share a common reservation and common funds. However, at some time prior to their merger, Tribe A had suffered an injury for which Congress later offers redress in the form of a jurisdictional act.

> In such a case Congress may recognize Tribe A as a tribe, entitled to bring suit in the Court of Claims, even though for most other purposes it is only a part of Tribe C.

See Felix S. Cohen, *Handbook of Federal Indian Law* Chap. 1, § B2d, at 12 (1982 ed.). For illustrative purposes, Cohen cites claims statutes allowing the *Delawares* to bring suit. *Id.* at 12 n.64; *see also Federal Indian Law* Chap. VI, § B-1, at 463 & n.32 (U.S. Dep't of Interior 1958); *Cherokee Nation*, 117 F.3d at 1502.

At most, *Weeks* stands for the proposition the Delawares reconstituted for claims purposes. Whether the Delawares were reconstituted—be it through Act of Congress or administrative practice—sometime after 1867 is not before us. *See supra* n.2. The present case, instead, turns on the DOI's interpretation of the 1866 Cherokee Treaty and 1867 Agreement. We thus have a duty to follow *Journeycake* and *Delaware Indians* because they directly control our interpretation of the agreement. Even *assuming Journeycake* and *Delaware Indians* conflict with the dicta in *Weeks* (which they do not), we nevertheless would be bound by those decisions. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (explaining that "[i]f a precedent of th[e] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e] Court the prerogative of overruling its own decisions."); *see also F.T.C. v. Kuykendall*, 371 F.3d 745, 752 (10th Cir. 2004) (en banc).

V.

We are not unsympathetic to the Delawares' cause. The DOI's unlawful actions, however, cannot provide the Delawares the status they seek. The agency's decision to extend recognition to the Delawares rested on an alleged "comprehensive legal analysis" that devoted three sentences, in a footnote, to the Supreme Court's decisions interpreting the 1866 Cherokee Treaty and 1867 Agreement. Agencies, like courts, must follow Supreme Court decisions and congressional acts. The DOI's recognition of the Delawares in this case was contrary to the United States Supreme Court's decisions in *Journeycake* and *Delaware Indians* and violated § 103(3) of the Federally Recognized Indian Tribe List Act.

Agencies, moreover, must follow their own rules and regulations. The DOI used a procedure heretofore unknown to the law—"retract and declare"—to purportedly re-recognize the Delawares. In so doing, the DOI's actions were arbitrary and capricious. The agency simply elected not to follow the Part 83 procedures for recognizing an Indian tribe and, furthermore, did not even properly waive application of those procedures. *See* 25 C.F.R. § 1.2. We accordingly hold unlawful and set aside the DOI's 1996 final decision. 5 U.S.C. § 706(2)(A). Any action taken by the agency on its 1996 final decision is void. "Further comment on this case is unnecessary." *Journeycake*, 155 U.S. at 218.

REVERSED.

SEYMOUR, Circuit Judge, concurring.

I agree with my colleagues that the Supreme Court's decisions in *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), control the outcome of this controversy. I therefore concur in the judgment. I write separately because I believe the majority unnecessarily denigrates the contrary position of the Delaware Tribe and the Department of Interior, which rely on the long and proud history of the Delaware Tribe's relations with the federal government to argue that the Tribe maintained its tribal sovereignty.[1] It is only after a very careful and particular examination of the Supreme Court's decisions in *Journeycake* and *Delaware Indians* in conjunction with an equally careful examination of the treaties and agreements they interpret, that one must conclude this controversy should be resolved in favor of the Cherokee Nation.

Contrary to the position adopted by the majority, I am not persuaded the terms of the 1867 Agreement between the Cherokees and Delawares were in fact, or had to be, completely consistent with the specific terms outlined in the 1866 Treaty between the Cherokees and the United States. The 1867 agreement was between two sovereign powers, one of which, the Delaware Tribe, was not bound by the Cherokee

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1. Indeed, the Department of Interior relies on the nearly 100 years of administrative practice of recognizing the Delaware Tribe to support its position that the Delawares remained a distinct tribal entity. *See* Aplt. app. at 241-266 (Department of Interior 1996 Memorandum listing in detail its many years of interacting with Delawares as a district tribe).

Treaty with the United States. In *Delaware Indians*, the Supreme Court indicated as much. The Court noted that while the 1867 Agreement between the Cherokees and Delawares was made in contemplation of the terms laid out in the 1866 Cherokee Treaty, the treaty should not be deemed to control in determining the terms and rights allocated in the 1867 Agreement. *Delaware Indians*, 193 U.S. at 134-35. The Court stated that

> the care with which [the agreement] was made and the evident intention of the parties to deal at arm's length with full knowledge of their respective rights and aims, leaves little to be gained from [the 1866 Cherokee Treaty and 1866 Delaware Treaty] as an aid to construction, except as a means of placing ourselves in the situation of the parties when the contract was signed and delivered.

Id. Hence, instead of viewing the 1866 Treaty as an exacting template against which to determine the Delawares' tribal status, the Supreme Court viewed the treaty as a general guide for determining the nature of the agreement between the Cherokees and Delawares.

Nor can it be said that the 1867 Agreement was entirely consistent with the terms set out in the 1866 Treaty. The Delawares' two payments to the Cherokee Tribe did not fit neatly within the payments described in either the preservation or incorporation option laid out in Article 15 of the treaty. *See Journeycake*, 155 U.S. at 196-98, 200-02 (setting out Article 15 of the Cherokee Treaty and the terms

of the 1867 Agreement). Similarly, the 1867 Agreement's language did not explicitly mirror the language laid out in either treaty option. Rather, the agreement seemed to mix and match language appearing in both the incorporation and preservation options of Article 15 of the treaty. The 1867 Agreement spoke of "looking to a location of the Delawares upon the Cherokee lands," *Journeycake*, 155 U.S. at 200, which is indicative of the preservation option. Indeed, the Court in *Journeycake* stated that the preservation option was one in which a tribe merely located itself "within the limits of the Cherokee Reservation." *Id.* at 204. However, in the same sentence in which the 1867 Agreement spoke of locating the Delawares upon Cherokee lands, the agreement also spoke of consolidating the Delaware Tribe with the Cherokee Nation. *Id.* at 200, 205. Similarly, the 1867 Agreement's last paragraph also contained language mixing the preservation and incorporation options. Some language mimicked that appearing in the treaty's preservation option which ensured that "preserved" tribes would be afforded the same rights as native Cherokees, while at the same time the 1867 Agreement's last paragraph used the word "incorporated," which can be directly ascribed to the incorporation option in the treaty.[2]

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2. As a point of comparison, the 1869 Agreement between the Shawnees and the Cherokees is similarly inconsistent with the 1866 Cherokee Treaty. The terms of that agreement by no means followed anything along the lines detailed in the 1866 Treaty, as acknowledged by the Supreme Court in *United States v. Blackfeather*, 155 U.S. 218, (1894). There the Court examined the terms of the 1869 Agreement and commented that the Shawnee agreement neither contained a provision for the purchase of homes nor a provision for the payment of money into the Cherokee national fund. *Id.* at 220. Nonetheless,

(Cont'd)

Appendix A

In reviewing the varying language which appeared in the 1867 Agreement between the Cherokees and Delawares, the Supreme Court indicated its belief that the Delawares incorporated themselves into the Cherokee Nation. *Journeycake*, 155 U.S. at 216; *see also Delaware Indians*, 193 U.S. at 135-37, 143-44. Instead of giving weight to the agreement's language stating that the Delawares were intending to locate their tribe on Cherokee lands, the Court focused on the agreement's language which spoke of the Delawares' consolidation with the Cherokees. *Journeycake*, 155 U.S. at 213. Likewise, in reviewing the relevance of the Delawares' two payments to the Cherokee tribe, the Court did not deem the second payment to be for a distinct set of lands under the preservation option of Article 15. Rather, the Court construed the land payment as a means by which the Delawares secured for themselves an allotment position, should the Cherokee lands be allotted in the future. *Id.* at 215. The preservation of an allotment interest for tribes settling on Cherokee land, whether by incorporation or preservation, was not mentioned in any regard in the 1866 Cherokee Treaty. Thus, although the terms of the 1867 Agreement did not fit neatly within either option outlined in Article 15 of the 1866 Treaty, the Supreme Court nonetheless decided the Delawares had opted for incorporation. The Court

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(Cont'd)
in looking at the language in the 1869 Agreement, which included a statement that the "Shawnees shall abandon their tribal organizations," *id.*, and language which followed almost exactly the incorporation language appearing in Article 15 of the 1866 Treaty, *id.*, the Court determined the Shawnees were incorporated into the Cherokee Tribe and should be afforded the same rights enjoyed by native Cherokees.

reached this decision by attributing more weight to the agreement's incorporation language than to the language which implied preservation, and by virtue of the Delawares' failure to obtain separate land within the Cherokee Reservation. *Journeycake*, 155 U.S. at 205-06, 213; *see also Delaware Indians*, 193 U.S. at 135-37. The reason for this conclusion may have been in part due to the litigation position taken by the Delawares. In this regard, the Complaint filed in *Journeycake* by the Delawares asserted that under the 1867 Agreement, the Delawares had "abandoned their separate tribal organization." Aplt. supp. br., Second supp. add. at 8.

In sum, I am ultimately compelled to conclude the Supreme Court determined in *Journeycake* and *Delaware Indians* that the Delaware Tribe incorporated itself into the Cherokee Nation and abandoned its tribal sovereignty when it entered into the 1867 Agreement. Accordingly, it is irrelevant that the subsequent history of the Delaware Tribe's relations with the federal government and the Supreme Court's *dicta* in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), on which the Department of Interior's 1996 decision in favor of the Delawares relied, arguably indicate to the contrary. *See Weeks*, 430 U.S. at 77 ("Despite their association with the Cherokees, these Indians, called 'Cherokee Delawares' . . . have over the years maintained a distinct group entity, and are today a federally recognized tribe.").

I therefore agree that we must **REVERSE.**

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND FILED JULY 23, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 98-CV-903-H

CHEROKEE NATION OF OKLAHOMA, on behalf of all its members, Plaintiff,

v.

Gale NORTON, in her official capacity as Secretary of Interior of the United States Department of Interior; NEAL McCALEB, in his capacity as Assistant Secretary of the Department of the Interior; and THE DELAWARE TRIBE OF INDIANS, as an indispensable party pursuant to Federal Rule of Civil Procedure 19,

Defendants.

ORDER

This matter comes before the Court on motions by each of the parties with respect to a decision by the Secretary of Interior (the "Secretary") in 1996 to withdraw a letter issued by an official in the Department of Interior (the "Department") in 1979 (the "1979 letter"). The effect of such withdrawal was to re-establish certain dealings between the United States and the Delaware Tribe of Indians. For the reasons set forth below, the Court finds that the Secretary's withdrawal of the 1979 letter should be upheld as an

appropriate exercise of the Secretary's authority. The Court further finds, however, that this determination may not resolve all the issues in this case and that additional questions must be addressed as described more fully herein below.

I

The procedural facts that form the basis of the present action were set forth in Federal Defendants' Response Brief to Plaintiff's Opening Brief and were not properly contested by Plaintiff.[1] Based upon this statement of facts and the administrative record in this case, the Court finds as follows:

1. In 1992, the Delaware Tribe of Indians undertook to have the Assistant Secretary-Indian Affairs review the actions taken by an official in the Department in 1979. AR 6 0002.

2. The 1979 position of the Department was that the 1958 bylaws of the Delaware Tribe did not establish "a relationship with the Federal Government separate from that of the Cherokee Nation." AR 1 0105.

3. The 1979 position did not include an analysis of the historical direct government-to-government dealings with the Delaware Tribe. AR 1 0100-106.

1. The Court notes that Plaintiff did not controvert the Federal Defendants' statement of facts in the manner prescribed by the Local Rules. Moreover, at the hearing on January 25, 2002, Plaintiff did not challenge Defendants' statement of facts. Only later, on January 29, 2002, did Plaintiff undertake to contest Defendants' statement of facts. This filing, however, was both untimely and not in compliance with the Local Rules. Accordingly, this filing (Docket No. 110) is hereby stricken.

4. The Department followed the 1979 position until 1996. AR 1 0008.

5. On February 23, 1993, the Office of Tribal Services, Bureau of Indian Affairs, requested the Associate Solicitor, Indian Affairs, to provide an opinion concerning "Delaware-Cherokee relations." AR 6 0003.

6. In 1994, the Delaware Tribe submitted a revised document to the Department of the Interior entitled "A Lesson in Administrative Termination: An Analysis of the Legal Status of the Delaware Tribe of Indians." AR 2 0002 *et seq.*

7. In response to receiving this Delaware Tribe submission, the Cherokee Nation presented its position to the Department on September 6, 1994. AR 6 0018.

8. Following a preliminary review of the documents submitted and a preliminary review of additional files at the Department, including documents submitted previously by the Cherokee Nation, the Acting Associate Solicitor, Indian Affairs, requested the Cherokee Nation to submit any additional information that it wanted the Department to consider. AR 6 0062.

9. The Cherokee Nation, on July 19, 1995, submitted additional comments: "The Legal Status of the Delawares vis a vis Cherokee Nation." AR 3 0002 *et seq.*

10. The Associate Solicitor, Indian Affairs, prepared a memorandum to the Assistant Secretary, Indian Affairs, dated June 19, 1996. AR 1 0007 *et seq.*

11. The Associate Solicitor's memorandum included an analysis of the historical documents, administrative practice, and all comments submitted by the Delaware Tribe and Cherokee Nation. AR 1 0007 *et seq.*

12. The memorandum concluded that the position taken in 1979 should be reconsidered because independent government-to-government dealings with the Delaware Tribe "more accurately reflects the appropriate legal interpretation of the treaties and agreements from the 1860's and more accurately reflects the bulk of the administrative practice." AR 1 0008.

13. The Assistant Secretary, Indian Affairs, approved the Associate Solicitor's memorandum on June 26, 1996. AR 1 0006.

14. On June 27, 1996, the *Federal Register* published notice of the Assistant Secretary, Indian Affairs', proposed decision to retract "the position of the Department stated in the 1979 letter," because that position "did not consider the entire relevant legal record and did not construe accurately the provisions of the 1866 Treaty with the Delaware and the 1867 Agreement between the Delaware and Cherokee." AR 1 0004.

15. The Assistant Secretary, Indian Affairs, accepted comment on this proposed action. AR 1 0004.

16. Public comment was submitted but none of the comments addressed the analysis presented in the Assistant Secretary's preliminary decision. AR 1 0117 *et seq.*

Appendix B

17. The Cherokee Nation's comment was slightly over one page in length and stated that "if the Delawares can concede that their actions will not result in any diminishment of the Cherokee Nation's present funding, its service area or jurisdictional base then separate recognition would be agreeable to the tribe." The Cherokee Nation did not object to the analysis presented in the Assistant Secretary's preliminary decision and did not suggest an alternative analysis. AR 1 0118-19.

18. On September 23, 1996, the Assistant Secretary decided that based on the comprehensive legal review conducted by the Division of Indian Affairs, and based on a review of the comments received from the public, the Department would retract the position taken by the Department in 1979 and restore direct dealings with the Delaware Tribe of Indians. The Department would continue its government-to-government dealings directly with the Delaware Tribe of Indians. The Assistant Secretary gave notice that the Delaware Tribe of Indians was a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe. AR 1 0110 *et seq.*

19. The Assistant Secretary's decision addressed each of the public comments received. AR 1 0110-11.

20. The Assistant Secretary found that "there is nothing in these comments which indicates that the basis of the proposed decision is in error or that the legal analysis of June 19, 1996, includes errors or is incomplete. These comments, therefore, do not merit a change in the proposed decision." AR 1 0111.

21. The Assistant Secretary concluded that the Delaware Tribe of Indians "will have the same rights to demand consultation and contracting as other tribes. As a separate sovereign the Delaware Tribe of Indians will have the same legal rights and responsibilities as other tribes, consistent with federal law, both as to jurisdiction and as to its rights to define its membership." AR 1 0111.

22. The Assistant Secretary concluded that "[t]his decision in effect clarifies the government-to-government relationship between the United States and the Delaware Tribe of Indians which was understood to exist before the May 1979 letter." AR 1 0111.

23. The Assistant Secretary provided that "[t]he notice of proposed decision, 61 FR 33534, is hereby made final." AR 1 0111

24. Notice of the decision was published in the *Federal Register*, 61 Fed.Reg. 50, 862 (Sept. 27, 1996). AR 1 0110-11.

II

At the outset, the Court must determine whether, and to what extent, deference to the Secretary's decision to withdraw the 1979 letter is appropriate. It is settled law that when Congress has "explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984), and any ensuing regulation is binding on the courts unless procedurally defective, arbitrary or capricious in substance,

or manifestly contrary to the statute. *See id.* at 844; *United States v. Morton*, 467 U.S. 822, 834 (1984); Administrative Procedures Act ("APA"), 5 U.S.C. §§ 706(2)(A), (D) (1996). But whether or not an agency enjoys an express delegation of authority on a particular question, an agency charged with applying a statute necessarily makes all sorts of interpretive choices, and, while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)), and "[the Supreme Court has] long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Chevron*, 467 U.S. at 844 (footnote omitted); *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care,[2] its consistency,[3] formality, and relative

2. *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (courts consider the "'thoroughness evident in [the agency's] consideration'" (quoting *Skidmore*, 323 U.S. at 140)).

3. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.").

expertness,[4] and to the persuasiveness of the agency's positions. *See Skidmore*, 323 U.S. at 139-140. The approach has produced a spectrum of judicial responses, from great respect at one end, *see, e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389-390 (1984) (giving "'substantial deference'" to administrative construction), to near indifference at the other, *see, e.g., Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988) (evaluating an interpretation advanced for the first time in a litigation brief). As Justice Jackson stated:

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140.

In *Chevron*, the Court recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." 467 U.S. at 844. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet, it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be

4. *See, e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984).

able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. *Id.* at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, *see id.* at 845-846, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable, *see id.* at 842-845; cf. 5 U.S.C. § 706(2) (a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

The Supreme Court has recognized that a good indicator of delegation meriting *Chevron* treatment is express congressional authorization to engage in the process of rulemaking or adjudication. *Cf. EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (no *Chevron* deference to agency guideline where congressional delegation did not include the power to " 'promulgate rules or regulations' ") (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976)). It is fair to assume generally that Congress contemplates administrative action with the effect of law where, as here, the agency provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) (noting the deference due to actions taken

pursuant to APA notice-and-comment procedures "designed to assure due deliberation"). Thus, a significant majority of cases applying *Chevron* deference have reviewed administrative actions resulting from notice and comment proceedings.[5]

Before according *Chevron* deference, the Court must first determine whether "Congress delegated authority to the agency generally [to make such determinations] carrying the force of law," and whether "the agency interpretation claiming deference was promulgated in the exercise of [that] authority." *United States v. Mead Corp.*, 533 U.S. 218 (2001).

In the instant case, it is clear that Congress has delegated broad authority to the Department to manage "all Indian affairs and . . . all matters arising out of Indian relations," as well as authority to promulgate regulations having the force and effect of law.[6] The 1866 Treaty with the Cherokee,

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5. The Court notes that in the present case, Plaintiff was given notice and opportunity to be heard prior to the Secretary's final decision to retract the 1979 letter. While this is not formal administrative rulemaking, the principles of fairness and deliberation apply to the instant process with equal force.

6. *See* 25 U.S.C. § 1 (establishing position of Commissioner of Indian Affairs within the Department of Interior), § 2 (delegating to Commissioner of Indian Affairs "the management of all Indian affairs and of all matters arising out of Indian relations"), § 9 (delegating to the President the power to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs"); *see also Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57 (2d Cir. 1994) (surveying history

(Cont'd)

the 1867 Agreement, and the statutes and regulations relied on by the Cherokee Nation in its Amended Complaint all explicitly concern or regulate Indian affairs. The Department's interpretation of these authorities therefore "come[s] within the area of Indian affairs and relations," and may be entitled to *Chevron* deference. *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1165 (N.D. Ind. 1995) (quotation omitted).

Chevron requires a two-step analysis: first, the Court must determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If not, the Court must then examine whether the agency's interpretation is reasonable and consistent with the purposes of the law. *Id.* at 844-45. If the authority under scrutiny is ambiguous and the agency's interpretation is reasonable, the agency's interpretation *must* be accepted. *Id.* at 842-844; *see also Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000) (noting that "[i]n *Chevron*, we held that a court *must* give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute" (emphasis added)).

The Court notes that the Tenth Circuit has held that the canon of construction that ambiguities are to be resolved in favor of Native Americans controls over the deference otherwise afforded administrative agencies under *Chevron*.

(Cont'd)
of Congressional delegation of power to administer Indian affairs to executive branch); 43 U.S.C. § 1457 (charging the Secretary with the supervision of public business relating to Indians). More recently, much of the Secretary's authority for the conduct of federal Indian policy has been delegated to the Assistant Secretary of Indian Affairs. *See* 209 Dept. Manual 8.1.

See Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997). However, the Tenth Circuit and other courts have also held that this canon is inapplicable when "the [competing] interests at stake both involve Native Americans."[7] Thus, this canon of construction is inapplicable here because the instant case involves judicial review of a Federal agency decision that hinged in part on the interpretation of Federal laws and a federally-approved agreement affecting competing Native American interests.

In addition to *Chevron* deference, the Secretary's interpretations are also entitled to consideration for deference under *Skidmore*. The deference afforded agency interpretations and decisions under *Skidmore* is separate and distinct from *Chevron* deference. As the Supreme Court recently clarified, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires. . . ." *Mead Corp.*, 533 U.S. at 234 (quotation omitted).

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7. *See Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995) (*citing Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) ("[This] canon has no application here; the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members.")); *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996) ("The government owes the same trust duty to all tribes, including the Quinault. . . . We cannot apply the canons of construction for the benefit of the [Chehalis Tribe] if such application would adversely affect Quinault interests.")

Appendix B

III

The above authorities make clear that some degree of deference is appropriate in this case. The extent of such deference, however, must be measured by the fact that Defendants are seeking to retract of a position previously announced in 1979. Indeed, Plaintiff argues that the Secretary's change of position in this case should preclude any deference whatsoever.

It is well-settled that *Chevron* deference does not control where an agency's interpretation of its regulations is inconsistent with its own prior administrative interpretations. *Shoshone Indian Tribe v. Hodel*, 903 F.2d 784, 787 (10th Cir.1990); *cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Moreover, "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis. . . ." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971).

In the instant case, the Acting Deputy Commissioner of the Bureau of Indian Affairs effectively declared in 1979 that the Department would no longer deal directly with the Delaware Tribe "[f]or governmental purposes" and that thereafter "[o]ur government-to-government relationship is

with the Cherokee Nation which has within its membership the Cherokee Delaware Tribe." Based upon a review of the record, the Court finds that this declaration dramatically changed the nature of the dealings then in effect between the United States and the Delaware Tribe.

The 1979 letter was striking both for the superficiality of its analysis and for the sweeping impact of its conclusions. Furthermore, the 1979 letter was issued without notice and opportunity to be heard. Finally, the 1979 letter was a change in prior practice, yet it advanced no reasoned basis for its conclusions. *See Motor Vehicle Mfrs. Assoc. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). Indeed, the Court finds that had the 1979 letter been challenged in court, this action by the Department would not have been entitled to any deference whatsoever.

The process by which the 1979 letter was issued (as opposed to its substance) informs the Court's perspective on its current review of the Secretary's decision to retract the 1979 letter. As noted above, the Secretary now seeks to retract a letter which this Court believes was entitled to no deference under applicable law. Accordingly, the issue is not the same as a change of course in which deference is diminished because a previous decision, carefully considered and properly crafted, is being reversed. *See Shoshone Indian Tribe*, 903 F.2d 784. To the contrary, the Secretary here seeks to retract a manifestly flawed declaration of policy issued without regard to legally mandated deliberation and proper procedural safeguards. Simply stated, retracting a capricious action and thereby restoring the *status quo ante* is different from retracting a prior decision that was fully considered

and properly developed. Accordingly, with respect to the Secretary's decision to retract the 1979 letter, the Court finds that substantial deference under *Chevron* is appropriate.

This finding, however, does not end the analysis. The question becomes whether granting substantial deference to the Secretary's decision to retract the 1979 letter in fact resolves the issue of whether the notice issued by the Secretary on September 27, 1996, with respect to relations between the United States and the Delaware Tribe was in accordance with law.

IV

At the outset, the Court notes that the action by the Secretary at issue here may involve more than the mere retraction of the 1979 letter. Specifically, the notice dated September 27, 1996, provides in applicable part as follows:

> . . . the Assistant Secretary hereby retracts the letter of May 24, 1979. The notice of proposed decision, 61FR33534, is hereby made final. Notice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

Thus, the Assistant Secretary first retracted the 1979 letter and, second, declared the Delaware Tribe a "recognized" tribal entity, "eligible for funding and services from the Bureau . . . by virtue of its status as an Indian tribe." Clearly, the former of these actions retracts the 1979 letter and restores

the relationship between the Department and the Delaware to the *status quo ante*. The latter of these actions, however, potentially may constitute a declaration of new substantive policy. The Court will address each of these actions in turn.

A.

By the notice dated September 27, 1996, the Secretary expressly retracted the 1979 letter. A careful analysis of the 1979 letter and the circumstances surrounding its issuance makes clear why the Court should give substantial deference to this decision.

The 1979 letter is part of a series of letters arising out of an appeal dated October 4, 1977, of the Muskogee Area Director's approval of a plan to use certain program funds available to the Delaware Tribe of Oklahoma. The Assistant Secretary sent a response to that appeal on February 26, 1979, along with the 1979 letter. The 1979 letter contains five numbered paragraphs which purport to represent a "summary of our positions taken in those letters concerning the Cherokee Delaware Indians." Each of the five numbered paragraphs is set forth below and is followed by an analysis of its contents:

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1. Based on the 1867 Agreement and related statutes, the Cherokee Delawares are a tribe within the Cherokee Nation. They are Cherokee citizens with the same responsibilities and privileges as other citizens of the Cherokee Nation.

At the outset, it is noteworthy that all parties agree the status of the Delawares does not result from the 1867 Agreement, which was identified as controlling authority in the 1979 letter, but rather from the 1866 Treaty. Moreover, other than the improper identification of the 1867 Agreement, the 1979 letter cited no specific statute or other authorities for support. Furthermore, the statement insofar as it refers to the 1866 Treaty with the Cherokee, is not controverted by either Plaintiff or Defendants in the instant case. To the contrary, all parties agree that under Article 15 of the 1866 Treaty with the Cherokee, the Delawares are either "on equal terms in every respect with native citizens" (so-called "Option One") or entitled to "enjoy all the rights of native Cherokees" (so-called "Option Two").[8] Therefore, the

8. As detailed in Plaintiff's papers, Article 15 of the 1866 Treaty with the Cherokee provides two separate options available to "civilized Indians, friendly with the Cherokees and adjacent tribes" if settled by the United States "within Cherokee country": first, for "any such tribe or band of Indians" who "abandon their tribal organization" they "shall be incorporated into and ever after remain a part of the Cherokee nation, *in equal terms in every respect with native citizens"* (emphasis added) (so-called "Option One"); and, second, for "any such tribe" that "decide to preserve their tribal organization, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the 'Cherokee

(Cont'd)

description in this letter of Delawares as "Cherokee citizens with the same responsibilities or privileges as other citizens of the Cherokee Nation" has no substantive effect on the instant dispute.

> **2. The Cherokee Delawares may deal with their judgment awards and preserve their Delaware heritage and identity. For *governmental* purposes, however, they must look to the Cherokee Nation, of which they are an integral part.** (Emphasis in original).

This paragraph contains the most significant description of the status of the Delaware Tribe, asserting that "for *governmental* purposes" the Delawares "must look to the Cherokee Nation, of which they are an integral part."

The parties do not contest that the Delawares are an "integral" part of the Cherokee Nation.[9] For the same reasons described above with respect to paragraph one, this fact is true whether Option One or Option Two of the 1866 Treaty applies.

(Cont'd)

Nation, . . .'" there is a separate treatment (so-called "Option Two"). Under Option Two, "such tribe thus settled" shall "thence afterwards . . . *enjoy all the rights of native Cherokees.*" (emphasis added). Thus, under both Option One *and* Option Two, the tribe has effectively "the same responsibilities and privileges as other citizens of the Cherokee Nation."

9. The term "integral" is defined in Black's Law Dictionary as follows: "Term in ordinary usage means part or constituent component necessary or essential to complete the whole."

More importantly, the Court finds that there is nothing in the 1979 letter, the circumstances leading up to its issuance, or the record, that forms a basis for the assertions in paragraph two. Specifically, the 1979 letter contains no authorities and offers no analysis in support of its conclusion. Further, no opportunity for review and comment was provided to interested parties.

Finally, the Court observes that the language in this paragraph two of the 1979 letter to the effect that the Delawares may "preserve their Delaware heritage and identity," is evocative of the rights afforded under Option Two of the 1866 Treaty, which contemplates preservation of government-to-government relations with the United States—rather than Option One, which does not.

3. **The existing organizational structure, set forth in the 1958 bylaws, as amended, is *not* capable of adequately protecting the interests of the Cherokee Delaware people, as required by the 1972 Judgment Fund Legislation (86 Stat. 762). Our research has shown that the 1958 bylaws was adopted for the purpose of pursuing claims against the Federal Government relating to the period before the Delawares became part of the Cherokee Nation. Due to misunderstandings about the nature of that document, some have felt that organization, established for the Delawares a relationship with the Federal Government separate from that of the Cherokee Nation; such is not the case.** (Emphasis in original).

This paragraph traces back to an action taken in 1958, "for the purpose of pursuing claims against the Federal Government relating to the period before the Delawares became part of the Cherokee Nation." This relatively recent action, taken only 21 years prior to the issuance of the 1979 letter, without any historical context, clearly cannot support the claim that the Delaware Tribe's government-to-government relations with the United States for nearly 200 years should be similarly characterized as relating exclusively to pursuing claims against the United States. Moreover, this paragraph does not contain any citations to the Assistant Secretary's purported "research" and refers to "misunderstandings" as a result of which "some have felt that organization [set forth in the 1958 bylaws] established for the Delawares a relationship with the Federal Government separate from that of the Cherokee Nation." The paragraph

concludes, without any analysis whatsoever, with the bare declaration "such is not the case." There is absolutely nothing in this paragraph to suggest that the Secretary's 1996 decision to retract the 1979 letter should not receive substantial deference.

> **4. No consideration will be given to any proposals for the use of funds resulting from Dockets 72/ 298 or proceeds from awards appropriated since 1972, until there is established an entity that meets the requirements of the above cited Act, as determined by this office.**

This statement merely sets forth a proposed course of action based on the Assistant Secretary's conclusions, and therefore no substantive analysis by the Court is required.

> **5. Upon our approval of a new organizational document, proposals for the use of all judgment funds remaining to the credit of the tribe, must first be adopted, either by the adult membership or some entity which may be specifically empowered by the new organizational document to act on such matters.**

This paragraph likewise merely sets forth a proposed course of action based on the Assistant Secretary's conclusions and therefore no substantive analysis by the Court is required.

In light of the above, the Court finds that the Secretary's decision to retract each of these five numbered paragraphs, which together form the basis of the position articulated by

the Secretary in the 1979 letter, should receive substantial deference by the Court because each paragraph fails to cite any supporting facts or law whatsoever for the assertions and conclusions contained therein.

Based on these five paragraphs, the 1979 letter proceeds with two additional paragraphs. Specifically, the 1979 letter provides:

> **In view of our positions summarized above and the failure to achieve an organizational committee, I hereby withdraw the Bureau's approval of the 1958 Delaware Bylaws, as amended. Further, I am withdrawing our recognition of those officials elected or appointed pursuant to the bylaws. Our direct dealings with the Cherokee Delaware Indians is only for purposes of claims matters. *Our government-to-government relationship is with the Cherokee Nation which has within its membership the Cherokee Delaware Tribe.***
>
> **Until there can be established an appropriate entity to speak on behalf of the Delawares within the Cherokee Nation for claims purposes, we will deal with the adult membership in carrying out our responsibilities in these matters. Accordingly, I plan to promptly issue a letter to the adult Delawares within the Cherokee Nation telling them of the status of pending issues and inviting them to a meeting of that group to be held in Tulsa, Oklahoma during the latter part of July.** (Emphasis added).

The effect of these two paragraphs is to declare, based on the numbered paragraphs cited above that there will be no further government-to-government relations between the United States and the Delaware Tribe.

The Court finds that the 1979 letter, relying on actions taken in 1958, fails to analyze, or even cite, any legal authorities which support such a sweeping change in policy. Further, such declaration of new policy was announced without regard to proper procedural safeguards. Therefore, the Court finds that the 1979 letter was both substantively and procedurally infirm. The Secretary's decision to retract the 1979 letter, therefore, is entitled to substantial deference. Applying this standard of deference, the Secretary's decision to retract the 1979 letter is hereby sustained.

B.

As noted previously, the Secretary's notice issued September 27, 1996, arguably encompasses two decisions: first, a decision to retract the 1979 letter and, second, a decision to declare a new policy with respect to the status of the Delaware Tribe and relations between the Delaware Tribe and the United States. As stated above, the Court hereby sustains the Secretary's decision to retract the 1979 letter and thereby to restore the *status quo ante*. The question becomes whether the Secretary's notice on September 27, 1996, also effected a substantive change in the *status quo ante* and, if so, whether that change is justified as a matter of law.[10]

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10. The notice published in the Federal Register on June 27, 1996, states in applicable part that ". . . the Assistant Secretary has

(Cont'd)

Appendix B

The Court finds that the briefs to date have not adequately separated the issue of retraction of the 1979 letter from the issue of whether the 1996 notice altered the policy of the United States in place prior to the issuance of the 1979 letter (and if so, in what way and on what basis).

Based upon the above, the Court orders as follows:

1. The Secretary's decision of September 27, 1996, insofar as it retracts the 1979 letter is hereby sustained.

2. The parties shall brief the issue of whether the notice of September 27, 1996, goes beyond the mere retraction of the 1979 letter and reinstatement of the *status quo ante* in effect prior to the issuance of the 1979 letter.

3. Assuming *arguendo* the 1996 letter announces a new substantive policy toward the Delaware Tribe compared to that in effect prior to the issuance of the 1979 letter, the parties shall further brief the issue of whether the law supports such a change in policy.

(Cont'd)

made a preliminary determination that the position of the Department stated in the 1979 letter should be retracted." The notice provides that "[t]he public has until July 29, 1996 to comment on this preliminary decision." The notice gives no indication that the proposed action of the Secretary was anything more than a retraction of the 1979 letter. By comparison, the notice published in the Federal Register on September 27, 1996, states in applicable part "the Assistant Secretary hereby retracts the letter of May 24, 1979[,]" and states further that "[n]otice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian Tribe."

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The parties shall file simultaneous briefs with respect to the issues identified in paragraphs 2 and 3 above not later than August 19, 2002, and shall file simultaneous response briefs not later than September 9, 2002.

IT IS SO ORDERED.

Dated this 23rd day of July, 2002.

s/ Sven Erik Holmes
Sven Erik Holmes
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED AND FILED DECEMBER 20, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 98-CV-903-H

CHEROKEE NATION OF OKLAHOMA,
on behalf of all its members,

Plaintiff,

v.

Gale NORTON, in her official capacity as Secretary of Interior of the United States Department of Interior; NEAL McCALEB, in his capacity as Assistant Secretary of the Department of the Interior; and THE DELAWARE TRIBE OF INDIANS, as an indispensable party pursuant to Federal Rule of Civil Procedure 19,

Defendants.

ORDER

This matter comes before the court on an appeal by Plaintiff Cherokee Nation of Oklahoma (the "Cherokee") of a decision by the Secretary of Interior (the "Secretary") in 1996 to withdraw a letter issued by an official of the Department of Interior (the "Department") in 1979 (the "1979 letter"). The effect of such withdrawal was to re-establish certain dealings between the United States and the Delaware Tribe of Indians (the "Delaware").

Appendix C

I

On July 23, 2002, this Court entered an order sustaining the Secretary's decision to retract the 1979 letter (the "Order"). The basis for this decision is set forth fully in the Order, which the Court hereby incorporates herein by reference. In sustaining the Secretary's decision to retract the 1979 letter, the Court also sustained the Secretary's decision to return to the *status quo ante* prior to the issuance of the 1979 letter. However, the Court raised the question whether the Secretary's final decision on September 27, 1996, which included a statement that the Delaware is a tribal entity recognized and eligible for funding, went beyond a mere return to the *status quo ante* and actually announced a new substantive policy. In the Order, the Court explained this as follows:

> At the outset, the Court notes that the action by the Secretary at issue here may involve more than the mere retraction of the 1979 letter. Specifically, the notice dated September 27, 1996, provides in applicable part as follows:
>
> > . . . the Assistant Secretary hereby retracts the letter of May 24, 1979. The notice of proposed decision, 61FR33534, is hereby made final. Notice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

> Thus, the Assistant Secretary first retracted the 1979 letter and, second, declared the Delaware Tribe a "recognized" tribal entity, "eligible for funding and services from the Bureau . . . by virtue of its status as an Indian tribe." Clearly, the former of these actions retracts the 1979 letter and restores the relationship between the Department and the Delaware to the *status quo ante.* The latter of these actions, however, potentially may constitute a declaration of new substantive policy. The Court will address each of these actions in turn.
>
> * * *
>
> As noted previously, the Secretary's notice issued September 27, 1996, arguably encompasses two decisions: first, a decision to retract the 1979 letter and, second, a decision to declare a new policy with respect to the status of the Delaware Tribe and relations between the Delaware Tribe and the United States. As stated above, the Court hereby sustains the Secretary's decision to retract the 1979 letter and thereby to restore the *status quo ante.* The question becomes whether the Secretary's notice on September 27, 1996, also effected a substantive change in the *status quo ante* and, if so, whether that change is justified as a matter of law.

(07/23/02 Order at 13, 18-19.)

Based on the above-described concern with respect to the impact of the retraction of the 1979 letter, the Court ordered

additional briefing on the question of whether the final decision of the Secretary, which included the statement regarding the recognition of the Delawares as a tribal entity eligible for funding, announced a new substantive policy.[1]

Thus, the remaining question before the Court is whether the Secretary correctly determined that the *status quo ante*, prior to the issuance of the 1979 letter, was as follows: "[T]he Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian Tribe." If so, the Secretary's final decision in September of 1996 did not constitute a declaration of new policy and therefore did not effect a substantive change in the *status quo ante*. The Delaware and the Secretary argue that the Secretary's determination of the *status quo ante* prior to the issuance of the 1979 letter should be upheld. For the reasons set forth below, the Court agrees.

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1. In this regard, the Court observes that the initial notice published in the Federal Register on June 27, 1996, states in applicable part that "the Assistant Secretary has made a preliminary determination that the position of the Department stated in the 1979 letter should be retracted." The initial notice provides that "[t]he public has until July 29, 1996 to comment on this preliminary decision." By comparison, the final decision published in the Federal Register on September 27, 1996, states in applicable part that "the Assistant Secretary hereby retracts the letter of May 24, 1979[,]" and further states that "[n]otice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian Tribe."

Appendix C

II

As noted above, the issue currently before the Court is the Secretary's determination that, pursuant to a return to the *status quo ante*, "the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services." The scope of a district court's review of an administrative agency decision is governed by section 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.* Section 706 of the APA provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under the APA, we review agency action de novo to determine whether it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996) (quoting section 706(2)(A) of the APA). The "essential function" of judicial review of an agency action is "a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). Under the arbitrary and capricious standard, the objective of the Court's inquiry is to determine "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

Appendix C

III

At the outset, the Court finds that the Secretary is entitled to great deference in her determination that, prior to the issuance of the 1979 letter, the Delaware was a federally recognized sovereign entity entitled to direct government relations with the United States. The authorities supporting such deference were discussed at length in the Order and will not be rehearsed here. The Court finds that other authorities also compel the Court to resolve any question in favor of the Secretary's determination in this case.

It is well settled that issues involving government-to-government relations with Indian tribes are political questions inappropriate for judicial decision. As stated by the Supreme Court in *United States v. Holliday*, 70 U.S. 407, 419 (1865), "It is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same." In *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913), the Supreme Court limited this judicial deference, but only in situations in which the government acted arbitrarily in declaring a community or body of people an Indian tribe.

Similarly, the Court in *Baker v. Carr*, 369 U.S. 186 (1962), noted that cases questioning the status of Indian tribes are "representative" of political controversies sometimes inappropriate for judicial resolution, but that courts could strike down any "heedless extension" of that label. *Id.* at 216-17. As stated in Felix Cohen's *Handbook of Federal Indian*

Law, "[T]he courts have said that it is up to Congress and the Executive to determine whether a tribe exists." Felix Cohen, *Handbook of Federal Indian Law*, at 268 (1942). *See also Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) ("The judiciary has historically deferred to executive and legislative determinations of tribal recognition."); *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1496 (D.C. Cir. 1997) ("Whether a group constitutes a 'tribe' is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment."). This line of authority showing deference to actions of the executive with respect to Indian tribes directly applies to the Secretary's 1996 reconsideration, after notice and comment, of the Secretary's 1979 position in light of the historical government-to-government relationship between the United States and the Delaware until 1979.

IV

The Court finds not only that the Secretary's determination is entitled to deference, but also that it has ample support in the law. The Cherokee rely heavily on *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904). Citing these cases, the Cherokee assert that, under the 1867 Agreement, the Delaware elected to proceed in accordance with "Option 1" of Article 15 of the 1866 Treaty and therefore have abandoned their tribal organization. The Court finds that the Cherokee's reliance on these cases is misplaced. As the D.C. Circuit stated in *Cherokee Nation v. Babbitt*, "Neither *Journeycake* nor *Delaware Indians* explicitly

expressed whether the Delaware settled in Cherokee territory pursuant to the first or second provision of Article 15." *Cherokee Nation v. Babbitt*, 117 F.3d at 1500.

Instead, the Court directs its attention to more recent authority, specifically the 1972 Appropriations Act, 25 U.S.C. § § 1291-1297 ("1972 Appropriations Act"), and the Supreme Court's decision in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). The Court finds that these authorities provide a more sound legal basis than the two cases cited by the Cherokee for determining the *status quo* prior to the issuance of the 1979 letter.

In October of 1972, Congress passed the 1972 Appropriations Act, an act appropriating funds to the Delaware Tribe of Indians and the Absentee Delaware Tribe of Western Oklahoma to satisfy an Indian Claims Commission award. *See* 25 U.S.C. § § 1291-1297; AR vol. II, at 0205. The 1972 Appropriations Act provides, in pertinent part:

> The funds . . . shall be placed to the credit of the *Delaware Tribe of Indians* in the United States Treasury and shall be used in the following manner: 90 per centum of such funds shall be distributed in equal shares to each person enrolled pursuant to subsection 2(c)(1) of this title, and 10 per centum shall remain to the credit of the tribe in the United States Treasury and may be advanced, expended, invested, or reinvested *for any purpose that is authorized by the tribal governing body: Provided*, That the Secretary of

> the Interior shall not approve the use of the funds remaining to the credit of the tribe until the tribe has organized a legal entity which in the judgment of the Secretary adequately protects the interests of its members.

25 U.S.C. § 1294(b); AR vol. II, at 0059-60 (emphasis added). Following passage of the 1972 Appropriations Act, the Bureau of Indian Affairs ("BIA") reviewed the 1958 Bylaws and recommended that the Tribe adopt membership criteria to comply with the distribution requirements of the Act.[2] AR vol. II, at 0060. In a General Council meeting, the Delaware Tribe amended its bylaws to include such criteria, and the BIA approved the amendments on September 30, 1974. *Id.* In 1975, the BIA certified that the Delaware Tribe's amended bylaws provided "the legal entity which in the judgment of the Secretary of Interior adequately protects the interest of the Delaware Tribe of Indians pursuant to the [1972 Appropriations Act]." AR vol. IV, at 0076.

In 1977, the Supreme Court explicitly and unambiguously declared that the Delaware Tribe of Indians

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2. Following passage of the 1972 Appropriations Act, the BIA was unable to locate the 1958 Bylaws in its files. This caused some confusion on the part of the BIA as to whether the Tribe had sufficient governmental organization to distribute the funds in accordance with the 1972 Appropriations Act. However, in 1974, the BIA informed the Tribe that "[w]e have since located the file . . . and find that it was approved by the [BIA]. The Delaware Tribal Business Committee . . . would appear to meet the requirement found in the [1972 Appropriations Act] . . . that a legal entity exist that adequately protects the interests of its members." AR vol. I, at 0023-24; *see also id.* vol. II, at 0060-61.

was a federally recognized Indian tribe in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). *Weeks* involved claims by an unorganized group of Delaware descendants, the "Kansas Delawares," who were challenging the constitutionality of the 1972 Appropriations Act. The Kansas Delawares were descendants of those Delaware Indians who chose to remain in Kansas under Article 9 of the 1866 Delaware Treaty by "dissolv[ing] their relations with the tribe and becom[ing] citizens of the United States." *Id.* at 78. The Kansas Delawares alleged that their exclusion from the 1972 Appropriations Act resulted in the denial of equal protection in violation of the Due Process Clause of the Fifth Amendment. The Kansas Delawares argued that the Delaware Tribe of Indians was recognized only for claims purposes. The BIA argued that the Delaware Tribe of Indians was a federally recognized tribe for all purposes and that, under the 1867 Articles of Agreement, the Delaware Tribe was permitted and did "maintain their tribal laws, customs, and usages." AR vol. II, at 0047-48. The Supreme Court held, in an 8-1 decision, that the 1972 Appropriations Act was constitutional with respect to the Delaware Tribe of Indians and further held that "[d]espite their association with the Cherokees, these Indians, called the 'Cherokee-Delawares' in this suit, have over the years maintained a distinct group identity, *and they are today a federally recognized tribe.*" *Weeks*, 430 U.S. at 77 (emphasis added).

Appendix C

V

The Court finds it unnecessary to consider further the long history of relations between the Cherokee and the Delaware. The question is whether the Secretary effected a substantive change in the *status quo ante* in stating that the Delaware is a federally recognized sovereign tribe. The Court finds that the Secretary did not effect such a substantive change. The Secretary, who is entitled to great deference, has determined that, as a result of the withdrawal of the 1979 letter and return to the *status quo ante*, the Delaware is a federally recognized sovereign tribe. The Congress has acted in a manner consistent with this determination. The Supreme Court has declared the Delaware to be a federally recognized sovereign tribe. These actions and authorities properly control the Court's decision here.

Applying principles of deference and the arbitrary and capricious standard of review, the Court hereby sustains the decision of the Secretary in this case. Notice of this decision, published in the Federal Register on September 27, 1996, is hereby upheld in all respects. Accordingly, the Court finds that, pursuant to the Secretary's withdrawal of the 1979 letter and the return to the *status quo ante*, the Delaware Tribe of Indians is a federally recognized sovereign tribe.

IT IS SO ORDERED.

This 20th day of December, 2002.

s/ Sven Erik Holmes
Sven Erik Holmes
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED FEBRUARY 16, 2005

UNITED STATES COURT OF APPEALS — FOR THE TENTH CIRCUIT

No. 03-5055

CHEROKEE NATION OF OKLAHOMA,
on behalf of all its members,

Plaintiff-Appellant,

v.

GALE NORTON, Secretary of the United States Department of the Interior; AURENE MARTIN, Acting Assistant Secretary of the United States Department of the Interior; and DELAWARE TRIBE OF INDIANS,

Defendants-Appellees.

ORDER

Filed February 16, 2005

Before **SEYMOUR**, **BALDOCK** and **HARTZ**, Circuit Judges.

The matter is before the Court on the Federal Appellees' petition for panel rehearing. The Cherokee Nation has filed

a response. Upon consideration of these pleadings, we grant the petition for the limited purpose of striking the sentence on page 25 of the original decision which states, "[a]ny action taken on the agency's 1996 final decision is void[]" and replacing it with the following sentence designated here in bold:

"Any action taken by the agency on its 1996 final decision is void." The petition for rehearing is otherwise denied. An amended version of the court's opinion is attached to this order and shall stand as a substitute to the decision issued originally on November 16, 2004.

Entered for the Court
PATRICK FISHER, Clerk of Court

by s/ Amy Frazier
Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR PANEL REHEARING FILED JANUARY 11, 2005

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 03-5055

(D.C. No. 98-CV-903-H)
(N.D. Okla.)

CHEROKEE NATION OF OKLAHOMA,

Plaintiff-Appellant,

v.

GALE NORTON, Secretary of the Interior, AURENE MARTIN, Acting Assistant Secretary of the Interior, and the DELAWARE TRIBE OF INDIANS,

Defendants-Appellees.

ORDER
Filed January 11, 2005

Before **SEYMOUR**, **BALDOCK**, and **HARTZ**, Circuit Judges.

The matter is before the Court on the Delaware Tribe of Indians' Petition for Panel Rehearing and the Federal Appellees' Petition for Panel Rehearing. It is hereby ORDERED that the Delaware Tribe of Indians' Petition for

Appendix E

Panel Rehearing is DENIED. It is further ORDERED, pursuant to Fed. R. App. P. 40(a)(3), that the Cherokee Nation of Oklahoma file an answer to the Federal Appellees' Petition for Panel Rehearing, addressing the sole issue of whether the panel majority erred when it ruled that "[a]ny action taken on the agency's 1996 decision is void." The Cherokee Nation of Oklahoma's answer shall be filed by January 21, 2005, and in accordance with Fed. R. App. P. 40(b).

Entered for the Court,

Bobby R. Baldock
Circuit Judge

APPENDIX F — FINAL DECISION TO RETRACT 1979 DECISION OF THE DEPUTY COMMISSIONER OF INDIAN AFFAIRS REGARDING THE DELAWARE TRIBE OF INDIANS DATED SEPTEMBER 23, 1996

BUREAU OF INDIAN AFFAIRS

Final Decision To Retract 1979
Decision of the Deputy Commissioner
of Indian Affairs Regarding the
Delaware Tribe of Indians

AGENCY: Bureau of Indian Affairs, Interior

ACTION: Notice of final decision.

SUMMARY: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs (Assistant Secretary) by 209 DM 8.

Based on a comprehensive legal review conducted by the Division of Indian Affairs, Office of the Solicitor, dated June 19, 1996, and based on a review of the comments received from the public, the Assistant Secretary hereby retracts the letter of May 24, 1979, in which the Bureau of Indian Affairs through the Acting Deputy Commissioner determined that the Department of the Interior would engage in government-to-government relations with the Delaware Tribe of Indians only through the Cherokee Nation and that the Department would deal directly with the Delaware Tribe of Indians only for purposes of their claims against the United States. Notice is hereby given that the Delaware Tribe of

Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

A Notice of Intent to Retract the 1979 Decision was published in the Federal Register on June 27, 1996 (61 FR 33534, June 27, 1996). The public was given until July 29, 1996 to comment on the proposed decision. A copy of the June 19, 1996, legal review prepared by the Division of Indian Affairs was sent to the Cherokee Nation of Oklahoma and to the Delaware Tribe of Indians on June 21, 1996, inviting comments on the proposed decision to retract the May 24, 1979, letter. Copies of the legal review were sent also to the Chickasaw Nation of Oklahoma, Choctaw Nation of Oklahoma, Seminole Nation of Oklahoma, and Muscogee (Creek) Nation of Oklahoma.

Four letters containing public comments were received. Two of these letters included comments concerning the name of the tribe. The Federal Register notice of June 27, 1996 referred both to the "Delaware Tribe of Eastern Oklahoma" and to the "Delaware Tribe." By letter dated July 24, 1996, the Chief of the Delaware Tribe of Indians stated that although they had "been (unofficially) called 'The Delaware Tribe of Eastern Oklahoma' * * * our legal name is the *Delaware Tribe of Indians*." By letter dated July 28, 1996, the Delaware Tribe of Western Oklahoma expressed concern that the tribe might be called the "Delaware Tribe of Oklahoma," thereby causing confusion with the Delaware Tribe of Western Oklahoma. The Department has dealt with other tribes which have name similarities, as a review of the Federal Register list of "Indian Entities Recognized and Eligible to Receive

Services" demonstrates (60 FR 9250, Feb. 16, 1995). The comment in the July 24, 1996, letter is accepted and the Department will use the "Delaware Tribe of Indians" as the tribe's name.

The Delaware Tribe of Western Oklahoma expressed concern that this final status clarification action may prejudice its rights as a continuation of the Delaware Nation. In response, the Assistant Secretary directs attention to the June 16, 1996, legal review of the Division of Indian Affairs which states that the Delaware were the first Indians to enter into a formal treaty with the federal government and that over the years, the Delaware became divided into groups. The legal review notes specifically that one of these groups is the federally recognized tribe, the Delaware Tribe of Western Oklahoma. This final decision on the Delaware Tribe of Indians does not change the status, or history, of the Delaware Tribe of Western Oklahoma.

The comment from the Delaware Tribe of Western Oklahoma states that the treaties and agreements between the Delaware Nation and the United States, and the Cherokee Nation and the United States must be examined with precision, and that the final determination must address the issues of Delaware sovereignty rather than being a political determination. The June 19, 1996, legal review was such a comprehensive and detailed analysis of the relevant legal record, including a detailed evaluation of pertinent treaties and agreements. This comment raises no new information meriting additional analysis.

Appendix F

A comment was received from the Cherokee Nation dated July 25, 1996. This comment concerns the Cherokee Nation's jurisdictional service area, its court system, law enforcement, Indian child welfare services and civil jurisdiction. Referencing 105 Stat. 990 (1991) and 25 CFR 151.8, the tribe states that it cannot responsibly share its jurisdictional land base, and provides that if the Delawares "concede that their actions will not result in any diminishment of the Cherokee's present funding, its service area or jurisdictional base, then separate recognition would be agreeable to the tribe." A comment, by letter dated July 23, 1996, from an individual whose certificate of Indian blood identifies her as "Cherokee (adopted Delaware)," expressed concerns that the proposed decision did not contain language addressing the issues of dual enrollment and jurisdiction. This comment notes that the Delaware intend to prohibit dual enrollment, and that a driving force "is the acquisition and control of federal dollars."

The decision to retract the letter of May 24, 1979, is based on a comprehensive legal analysis of the pertinent treaties and agreements as well as a review of the Department of the Interior's administrative practice. Based on this review, the proposed decision published in the Federal Register concluded that the 1979 letter should be retracted because it was not consistent with federal law. Within the restraints imposed by federal law, the Delaware Tribe of Indians as a sovereign tribe will have the same rights to demand consultation and contracting as other tribes. As a separate sovereign, the Delaware Tribe of Indians will have the same legal rights and responsibilities as other tribes, consistent with federal law, both as to jurisdiction and as to its right to

define its membership. This decision in effect clarifies the government-to-government relationship between the United States and the Delaware Tribe of Indians which was understood to exist before the May 1979 letter. Although this decision may have legal consequences affecting the Cherokee Nation and the members of both tribes, there is nothing in these comments which indicates that the basis of the proposed decision is in error or that the legal analysis of June 19, 1996, includes errors or is incomplete. These comments, therefore, do not merit a change in the proposed decision.

Based on the legal analysis of the Division of Indian Affairs dated June 19, 1996, and based on the foregoing analysis of the comments received during the public comment period, the Assistant Secretary hereby retracts the letter of May 24, 1979. The notice of proposed decision, 61 FR 33534, is hereby made final. Notice is hereby given that the Delaware Tribe of Indians is a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe.

By letter dated August 21, 1996, the attorney for the Delaware Tribe of Indians indicated that at meeting of April 30, 1996, the Delaware Chief was informally advised that after the 30-day comment period following the Federal Register publication, the Delawares would have the opportunity to respond to any negative comments submitted. The letter of August 21, 1996, included the Delaware response to the comments of the Cherokee Nation and Delaware Tribe of Western Oklahoma. The notice in the Federal Register did not include a right by the Delaware Tribe of Indians to respond to the public comments. The letter of

August 21, 1996, was reviewed and because it does not raise any new information or legal arguments pertinent to the basis of the proposed decision, the Assistant Secretary need not address whether the Delaware Tribe of Indians had a right to file this response even though none was provided for in the Federal Register notice.

Nothing herein should be construed as altering the powers and duties of the Delaware Trust Board.

Representatives from the Muscogee Area Office of the Bureau of Indian Affairs shall consult with the Delaware tribal officials and develop, in cooperation with the tribe, a determination of needs and recommended budget, including a determination of the tribal service population.

DATES: This decision is final for the Department and is effective September 23, 1996.

Dated: September 23, 1996.

Ada E. Deer,
Assistant Secretary—Indian Affairs.

APPENDIX G — PERTINENT EXCERPTS OF THE TREATIES WITH THE DELAWARES AND CHERIOKEES, 1866

TREATY WITH THE DELAWARES, 1866.

Articles of agreement between the United States and the chiefs and councillors of the Delaware Indians, on behalf of said tribe, made at the Delaware Agency, Kansas, on the fourth day of July, eighteen hundred and sixty-six.

* * *

Article 4. The United States agree to sell to the said Delaware Indians a tract of land ceded to the Government by the Choctaws and Chickasas, the Creeks, or the Seminoles, or which may be ceded by the Cherokees in the Indian country, to be selected by the Delawares in one body in as compact a form as practicable, so as to contain timber, water, and agricultural lands, to contain in the aggregate, if the said Delaware Indians shall so desire, a quantity equal to one hundred and sixty (160) acres for each man, woman, and child who shall remove to said country, at the price per acre paid by the United States for the said lands, to be paid for by the Delawares out of the proceeds of sales of lands in Kansas, heretofore provided for. The said tract of country shall be set off with clearly and permanently marked boundaries by the United States; and also surveyed as public lands are surveyed, when the Delaware council shall so request, when the same may, in whole or in part, be allotted by said council to each member of said tribe residing in said country, said allotment being subject to the approval of the Secretary of the Interior.

Article 5. The United States guarantee to the said Delawares peaceable possession of their new home herein provided to be selected for them in the Indian country, and protection from hostile Indians and internal strife and civil

war, and a full and just participation in any general council or territorial government that may be established for the nations and tribes residing in said Indian country.

* * *

Article 11. The Delawares acknowledge their dependence upon the United States, and again renew their pledges of devotion to the Government thereof, and ask its protection; and the United States agree to protect, preserve, and defend them in all their just rights.

TREATY WITH THE CHEROKEE, 1866.

Articles of agreement and convention at the city of Washington on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs, [and] Elijah Sells, superintendent of Indian affairs for the southern superintendency, and the Cherokee Nation of Indians, represented by its delegates, James McDaniel, Smith Christie, White Catcher, S. H. Benge, J. B. Jones, and Daniel H. Ross—John Ross, principal chief of the Cherokees, being too unwell to join in these negotiations.

* * *

Article 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal

organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve

the tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude.

APPENDIX H — PUBLIC LAW 103-454, TITLE I
NOVEMBER 2, 1994
108 STAT. 4791

Public Law 103-454
103d Congress

An Act

To provide for the annual publication of a list of federally recognized Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—WITHDRAWAL OF ACKNOWLEDGEMENT OR RECOGNITION

SEC. 101. SHORT TITLE.

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

SEC. 102. DEFINITIONS.

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

SEC. 103. FINDINGS.

The Congress finds that—

(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST.—The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) FREQUENCY OF PUBLICATION.—The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

APPENDIX I — FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT OF 1994, AS CODIFIED IN THE U.S. CODE, 25 U.S.C. §§ 479a & 479a-1

§ 479a. Definitions

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 479a-1 of this title.

(Pub. L. 103-454, Title I, § 102, fn. 2, 1994, 108 Stat. 4791.)

§ 479a-1. Publication of list of recognized tribes

(a) Publication of the list

The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

(Pub. L. 103-494, Title I, § 104, Nov. 2, 1994, 108 Stat. 4762.)

APPENDIX J — PERTINENT EXCERPTS OF 25 C.F.R. PART 83 (1996)

PART 83—PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

* * *

§ 83.1 Definitions.

* * *

Autonomous means the exercise of political influence or authority independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the history, geography, culture and social organization of the petitioning group.

* * *

Community means any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. *Community* must be understood in the context of the history, geography, culture and social organization of the group.

* * *

Continuously or *continuous* means extending from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption.

* * *

Appendix J

Historically, *historical* or *history* means dating from first sustained contact with non-Indians.

Indian group or *group* means any Indian or Alaska Native aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

Indian tribe, also referred to herein as *tribe*, means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to exist as an Indian tribe.

* * *

Letter of intent means an undocumented letter or resolution by which an Indian group requests Federal acknowledgment as an Indian tribe and expresses its intent to submit a documented petition.

* * *

Previous Federal acknowledgment means action by the Federal government clearly premised on identification of a tribal political entity and indicating clearly the recognition of a relationship between that entity and the United States.

Appendix J

Sustained contact means the period of earliest sustained non-Indian settlement and/or governmental presence in the local area in which the historical tribe or tribes from which the petitioner descends was located historically.

Tribal relations means participation by an individual in a political and social relationship with an Indian tribe.

* * *

§ 83.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes. Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. Acknowledgment shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

Appendix J

§ 83.3 Scope.

(a) This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) Indian tribes, organized bands, pueblos, Alaska Native villages, or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs may not be reviewed under the procedures established by these regulations.

(c) Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations. The fact that a group that meets the criteria in § 83.7 (a) through (g) has recently incorporated or otherwise formalized its existing autonomous political process will be viewed as a change in form and have no bearing on the Assistant Secretary's final decision.

(d) Splinter groups, political factions, communities or groups of any character that separate from the main body of a currently acknowledged tribe may not be acknowledged

under these regulations. However, groups that can establish clearly that they have functioned throughout history until the present as an autonomous tribal entity may be acknowledged under this part, even though they have been regarded by some as part of or have been associated in some manner with an acknowledged North American Indian tribe.

(e) Further, groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.

(f) Finally, groups that previously petitioned and were denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title, may not be acknowledged under these regulations. This includes reorganized or reconstituted petitioners previously denied, or splinter groups, spin-offs, or component groups of any type that were once part of petitioners previously denied.

(g) Indian groups whose documented petitions are under active consideration at the effective date of these revised regulations may choose to complete their petitioning process either under these regulations or under the previous acknowledgment regulations in part 83 of this title. This choice must be made by April 26, 1994. This option shall apply to any petition for which

a determination is not final and effective. Such petitioners may request a suspension of consideration under § 83.10(g) of not more than 180 days in order to provide additional information or argument.

APPENDIX K — 1867 AGREEMENT WITH THE DELAWARES

ARTICLES OF AGREEMENT

WITH THE

DELAWARES,

Made this 8th day of April, A.D. 1867, between the Cherokee Nation, represented by William P. Ross, Principal Chief, Riley Keys, and Jessie Busheyhead, delegates duly authorized parties of the first part, and the Delaware tribe of Indians, represented by John Connor, Principal Chief, Charles Journeycake, Assistant Chief, Isaac Journeycake, and John Sarcoxie, delegates for and on behalf of said Delaware tribe, duly authorized, witnesseth:

WHEREAS, by the 15th article of a certain treaty between the United States and the Cherokee Nation, ratified August 11, 1866, certain terms were provided, under which friendly Indians might be settled upon unoccupied lands in the Cherokee country, east of the line of 96° of west longitude, the price to be paid for such lands to be agreed on by the Indians to be thus located and the Cherokee Nation, subject to the approval of the President of the United States; and, WHEREAS, by a treaty between the United States and the Delaware tribe of Indians, ratified August 10, 1866, the removal of the said Delawares to the Indian country, south of Kansas, was provided for, and in the 4th article whereof an agreement was made by the United States to sell to the Delawares a tract of land, being part of a tract the cession of

which by the Cherokees to the United States was then contemplated, and, WHEREAS, no-such cession of land was made by the Cherokees to the United States, but, in lieu thereof, terms were provided as hereinbefore mentioned, under which friendly Indians might be settled upon their lands; and, WHEREAS, a full and free conference has been held between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee Nation: NOW, THEREFORE, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfillment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres of land for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the office of Indian affairs, being the list of the Delawares who elect to remove to the "Indian country," to which list may be added, only with the consent of the Delaware Council, the names of such other Delawares as may, within one month after the signing of this agreement, desire to be added thereto; and the selections of the lands to be purchased by the Delawares, may be made by said Delawares in any part of the Cherokee reservation east of said line of 96°, not already selected and in possession of other parties; and in case the Cherokee lands shall hereafter be allotted among the members of said Nation, it is agreed that the aggregate amount of land herein provided

for the Delawares, to include their improvements according to the legal subdivisions, when surveys are made (that is to say, 160 acres for each individual), shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation; nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon the native citizens thereof; *provided*, that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee Nation.

And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees, from the Delaware funds, now held or hereafter received by the United States, a sum of money, equal to one dollar per acre, for the whole amount of 160 acres of land, for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions thereto, heretofore provided for. And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares, to procure funds necessary to pay for said lands; but, in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation, at their market value, at the date of such transfer. And the said Delawares further agree, that there shall be paid, from their funds, now or hereafter to come into possession of the United States, a sum of money, which shall sustain the same proportion to the existing

Cherokee National fund, that the number of Delawares registered as above mentioned, and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation. And, for the purpose of ascertaining such relative numbers, the registers of the Delawares herein referred to with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares; and an accurate census of the Cherokees residing in the Cherokee Nation, shall be taken, under the laws of that Nation, within four months, and properly certified copies thereof filed in the office of Indian Affairs, which shall be the basis of calculation as to the Cherokees. And, that there may be no doubt hereafter, as to the amount to be contributed to the Cherokee National fund by the Delawares, it is hereby agreed, by the parties hereto, that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000. And the Delawares further agree, that in calculating the total amount of said National fund, there shall be added to the said sum of $678,000, the sum of $1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee National fund $1,678,000, and this last mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund; *provided*, that, as the $678,000 of funds now on hand, belonging to the Cherokees, is chiefly composed of stocks of different values, the Secretary of the Interior may transfer, from the Delawares to the Cherokees, a proper proportion of the stocks now owned by the Delawares, of like grade and value, which transfer shall be in part of the *pro rata* contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the *pro*

rata contribution by the Delawares to said fund, shall be in cash or United States bonds, at their market value. All cash, and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the Delawares under this agreement, shall be invested and applied in accordance with the 23d article of the treaty with the Cherokees, of August 11th, 1866.

On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other,) in the national funds, as native Cherokees, save as hereinbefore provided. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

WM. P. ROSS, Principal Chief,
RILEY KEYES,
Cherokee Delegation.

his
JOHN [X] CONNOR, Principal Chief.
mark

CHARLES JOURNEYCAKE.
ISAAC JOURNEYCAKE

his
JOHN [X] SARCOXIE.
mark

Delaware Delegation.

Appendix K

Executed and delivered in our presence by the above named delegates of the Cherokee and Delaware Nations, at the city of Washington, in the District of Columbia, the day and year first above written.

JOHN G. PRATT.
WM. A. PHILLIPS.
EDWARD S. MENAGUS.

Ratified by the National Committee, June 15th, 1867.

SMITH CHRISTIE,
President Nat. Committee.

JNO. YOUNG,
Speaker of Council

Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

(4)
No. 04-1368

In the Supreme Court of the United States

DELAWARE TRIBE OF INDIANS, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that *Cherokee Nation* v. *Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904), established that the Delaware Tribe had abandoned its organized tribal status under an 1867 Agreement with the Cherokee Nation.

2. Whether the court of appeals erred by refusing to give deference to the Department of the Interior's interpretation of the 1867 Agreement.

3. Whether the court of appeals erred in finding that the Department of the Interior had acted arbitrarily and capriciously by not using or waiving the federal acknowledgment procedures found at 25 C.F.R. Part 83 to determine whether the Delaware Tribe maintained a government-to-government relationship with the United States.

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In the Supreme Court of the United States

No. 04-1368

DELAWARE TRIBE OF INDIANS, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 389 F.3d 1074. The opinions of the district court (Pet. App. 31a-55a, 56a-66a) are reported at 241 F. Supp. 2d 1374 and 241 F. Supp. 2d 1368.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2004. Pet. App. 1a. Petitions for rehearing were filed by the Delaware Tribe of Indians and by the Secretary of the Interior. An order denying the petition of the Delaware Tribe was entered on January 11, 2005, and an order granting in part, modifying the previous decision, and otherwise denying the petition of the Secretary was entered on February 16, 2005 (Pet. App. 67a-68a, 69a-70a). The petition for a writ of certiorari

was filed on April 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 23, 1996, the Assistant Secretary of the Interior for Indian Affairs issued a final decision confirming a direct, government-to-government relationship between the United States and petitioner Delaware Tribe of Indians. 61 Fed. Reg. 50,862 (Pet. App. 71a-76a). The 1996 decision formally retracted a letter of May 24, 1979, in which the Bureau of Indian Affairs, acting through the Acting Deputy Commissioner, had determined that the Department of the Interior would generally engage in government-to-government relations with the Delaware Tribe only through respondent Cherokee Nation of Oklahoma, and that the Department would engage in direct relations with the Delaware Tribe solely with respect to the Tribe's claims against the United States. The 1996 decision gave notice that the Department considered "the Delaware Tribe of Indians [to be] a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe," and that, "[a]s a separate sovereign, the Delaware Tribe of Indians will have the same legal rights and responsibilities as other tribes, consistent with federal law." 61 Fed. Reg. at 50,863.

The 1996 decision was based on a "comprehensive legal analysis of the pertinent treaties and agreements as well as a review of the Department of the Interior's administrative practice." 61 Fed. Reg. at 50,863. That analysis was set forth in a June 19, 1996, memorandum by the Associate Solicitor of the Interior for Indian Affairs. C.A. App. 241-266. As explained in the memoran-

dum, the United States entered into a treaty with the Cherokee Nation in 1866 (1866 Treaty), 14 Stat. 799, which provided in Article 15 that other Tribes could settle on Cherokee territory (in what later became the State of Oklahoma) under one of two options, 14 Stat. 803. See Pet. App. 78a-80a. First, Tribes wishing to abandon their tribal organization and incorporate into the Cherokee Nation could make a single payment for the right to treatment "on equal terms" with Cherokee citizens. *Id.* at 79a. Second, Tribes wishing to preserve their own tribal organizations and to maintain distinct tribal laws, customs, usages could make two payments, one for a "district of country" equal to 160 acres for each member of the incoming Tribe, and a second to "enjoy all rights of native Cherokees." *Ibid.*

The Associate Solicitor's memorandum determined that, pursuant to an 1867 agreement between the Delaware Tribe and the Cherokee Nation (the 1867 Agreement) (Pet. App. 91a-96a), the Delaware Tribe had made the two payments called for in the "preservation" option of Article 15 of the 1866 Treaty, thus preserving its distinct tribal organization and maintaining its own tribal laws, customs, and usages, while at the same time obtaining for its members the right to equal treatment as Cherokee citizens. The Associate Solicitor found that conclusion to be consistent both with provisions of an 1866 treaty between the United States and the Delaware Tribe, 14 Stat. 793 (Pet. App. 77a-78a), which contemplated that the Tribe would preserve its tribal organization when it moved to Cherokee territory, and with contemporaneous expressions of the Delaware Tribe's intent. See C.A. App. 244-247.

The Associate Solicitor's memorandum also explained that, after the Delaware Tribe relocated to

Cherokee territory, both Congress and the Executive Branch had treated the Delaware Tribe as an independent tribal entity with the ability to carry out tribal governmental functions. For instance, the Delaware Tribe over the years maintained a functioning government in the form of a Business Committee and a general council, and the Tribe in 1958 formalized its government in bylaws approved by the Department of the Interior. The Associate Solicitor also observed that this Court, in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 77 (1977), had affirmed that the Delaware Tribe was a federally recognized Tribe. For those reasons, the Associate Solicitor's memorandum determined that the position adopted in the 1979 letter, *viz.*, that the Delaware Tribe generally was to be dealt with only through the Cherokee Nation, was inconsistent with the historical record and with the Department's treatment of the Delaware Tribe for nearly a century. C.A. App. 247-266.

2. On October 2, 1996, respondent Cherokee Nation brought an action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, seeking to overturn the Department's 1996 decision to restore direct, government-to-government relations with the Delaware Tribe. The action was filed in the District Court for the District of Columbia. That court granted the government's motion to dismiss under Federal Rule of Civil Procedure 19, on the ground that the complaint had failed to name an indispensable party, the Delaware Tribe, which could not be joined due to its sovereign immunity. *Cherokee Nation of Okla.* v. *Babbitt*, 944 F. Supp. 974 (D.D.C. 1996).

The Court of Appeals for the District of Columbia Circuit reversed on the Rule 19 issue, concluding that the Delaware Tribe could not assert sovereign immunity as against the Cherokee Nation. *Cherokee Nation of*

Okla. v. *Babbitt*, 117 F.3d 1489, 1503 (D.C. Cir. 1997). The court of appeals expressly limited its holding to the Rule 19 issue, leaving "for initial decision by the district court the proper interpretation of the 1867 agreement with the Delaware Tribe as a party to the proceedings and in light of the full administrative record, which is not before this court." *Id.* at 1503 n.15. On remand, the Delaware Tribe was joined as a defendant. The district court then concluded that it lacked personal jurisdiction over the Delaware Tribe and transferred the case to the District Court for the Northern District of Oklahoma. Pet. App. 4a.

3. a. The District Court for the Northern District of Oklahoma upheld the 1996 decision. Pet. App. 31a-66a. The court held that the Department's decision was owed substantial deference, *id.* at 36a-45a, and that the decision was not arbitrary or capricious but rather, was consistent with congressional actions and the decisions of this Court, *id.* at 62a-66a.

b. The court of appeals reversed. Pet. App. 1a-30a. The court explained at the outset its understanding that the Department's 1996 decision was based "solely" on an interpretation of the 1867 Agreement and 1866 treaties, and that the case thus turned exclusively "on the status of the Delawares under the treaties and the agreements entered into by the Cherokees and Delawares in the 1860s." *Id.* at 6a-7a. The court specifically left "for another day what effect, if any, the post-1867 legislative and executive dealings with the Delawares had on their alleged status as a tribe." *Id.* at 6a-7a n.2; see *id.* at 24a ("Whether the Delawares were reconstituted—be it through Act of Congress or administrative practice—sometime after 1867 is not before us.").

The court gave no deference to the Department's interpretation of the 1866 treaties and 1867 Agreement, reasoning that Congress had not given the agency discretion to administer those instruments. Pet. App. 7a. The court construed the 1867 Agreement and 1866 treaties as establishing that the Delaware Tribe had selected the incorporation option rather than the preservation option, and that the Tribe thus had become absorbed into the Cherokee Nation rather than maintaining a distinct tribal identity. *Id.* at 7a-24a.

The court believed that its conclusion to that effect was compelled by this Court's decisions in *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904), and *Cherokee Nation* v. *Journeycake*, 155 U.S. 196 (1894). Pet. App. 12a-17a. The court also undertook its own analysis of the 1867 Agreement and the 1866 treaties, and, in particular, the two payments made by the Delaware Tribe to the Cherokees under the 1867 Agreement. *Id.* at 17a-22a. The court concluded, contrary to the Department of the Interior, that the second payment for the purchase of land occupancy rights was not intended to preserve the Delaware's tribal identity. Pet. App. 21a. Finally, the court rejected the government's and the Delaware Tribe's reliance on *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977), in which this Court observed that the Delaware Tribe, "[d]espite their association with the Cherokees, * * * have over the years maintained a distinct group identity, and they are today a federally recognized tribe," *id.* at 77. In the court of appeals' view, *Weeks* at most stood for the proposition that the Delaware Tribe had been reconstituted

for the purpose of asserting claims against the United States. Pet. App. 23a-24a.[1]

ARGUMENT

The court of appeals erred in its understanding of the effect of the 1867 Agreement on the status of the Delaware Tribe as a distinct Tribe with a government-to-government relationship with the United States. This Court's intervention is not warranted at this time, however, particularly because the court of appeals expressly left open the possibility that the Department could determine that the Delaware's status as a federally-recognized Tribe has been restored by later congressional and administrative actions.

1. Rejecting the Department's interpretation of the 1867 Agreement, the court of appeals found that the two payments made by the Delaware Tribe under that Agreement did not evidence an intent to proceed under the "preservation option" established by Article 15 of the 1866 Treaty with the Cherokee. The court of appeals concluded that even though the 1867 Agreement required the Delawares to make two payments—one for rights as Cherokees and one for land in the amount of 160 acres for each individual Delaware moving to Cherokee territory—the Agreement nonetheless did not invoke the preservation option. That conclusion is incorrect, and the court of appeals gave no convincing alternative explanation of the second payment. The court

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[1] Judge Seymour concurred in the judgment. Pet. App. 26a-31a. She believed that the majority "unnecessarily denigrates the contrary position of the Delaware Tribe and the Department of Interior, which rely on the long and proud history of the Delaware Tribe's relations with the federal government to argue that the Tribe maintained its tribal sovereignty." *Id.* at 26a.

also erred in declining to grant any deference to the Department's interpretation, reached after a notice and comment process, of the 1867 Agreement, the relevant treaties with the Cherokee Nation and the Delaware Tribe, and the historical background.

The court of appeals placed heavy reliance on two early cases of this Court dealing with the rights obtained by individual Delaware Indians under the 1867 Agreement. In *Cherokee Nation* v. *Journeycake*, 155 U.S. 196 (1894), this Court determined that the Delawares who had moved to Cherokee territory were entitled to share equally with Cherokees in the proceeds from the rental of certain lands. In *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904), this Court held that the land purchased pursuant to the 1867 Agreement was held by individual Delawares as life estates, and could not be inherited. Neither decision ruled on whether the Delaware Tribe had preserved its tribal organization by making the second payment contemplated under Article 15 of the 1866 Cherokee Treaty. See *Babbitt*, 117 F.3d at 1500. Accordingly, the court of appeals erred in finding that *Journeycake* and *Delaware Indians* had foreclosed the Department from finding that the payment the Delaware Tribe made for lands under the 1867 Agreement preserved its tribal organization.

2. The court of appeals made clear, however, that it was not ruling on the Delaware Tribe's alternative argument that, even if its tribal organization was lost in 1867, it was restored by later administrative and congressional actions. See Pet. App. 6a n.2. The court concluded that the Department's 1996 decision had not rested on a "restoration" theory, and the court accordingly left "for another day what effect, if any, the post-1867 legislative

and executive dealings with the Delawares had on their alleged status as a tribe." *Id.* at 6a & n.2.

There is substantial indication that, even if the Delaware Tribe relinquished its tribal organization in the 1867 Agreement, congressional and administrative actions following 1867 have restored the Delaware Tribe's status as a recognized tribe. Such a conclusion would be consistent with this Court's decision in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977). *Weeks* upheld, against an equal protection challenge, Congress's decision to distribute a claims award to the Delaware Tribe and a separate Tribe of Delaware descendants (the "Absentee Delawares") while excluding another group of Delaware descendants (the "Kansas Delawares"). The Court reasoned, *inter alia*, that the Kansas Delawares had severed their tribal relations, and, unlike the Delaware Tribe and the Absentee Delawares, were not a distinct and recognized tribal entity. *Id.* at 85-86. The Court observed with respect to the Delaware Tribe that, "[d]espite their association with the Cherokees, these Indians * * * have over the years maintained a distinct group identity, and today are a federally recognized tribe." *Id.* at 77. See also *id.* at 77 n. 8 ("it is clear that Congress * * * dealt with the Cherokee Delawares as a distinct entity").

This Court's treatment of the status of the Delaware Tribe in *Weeks* is in tension with the ruling below. At the very least, *Weeks* would be consistent with a determination that tribal status was "restored" to the Delaware Tribe subsequent to 1867.[2] Because the restora-

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[2] In dictum, the court of appeals suggested (Pet. App. 24a) that, "[a]t most, *Weeks* stands for the proposition the Delawares rec nstituted for claims purposes." Nothing in *Weeks* suggests such a limitation, and the *Weeks* majority in fact relied on a statute that recognized that the

tion question was explicitly left unresolved by the court of appeals, however, and because the case does not otherwise appear to implicate issues of broader significance concerning other Tribes, this Court's review does not appear warranted at this time.[3]

Delaware Tribe had a functioning tribal government. See 430 U.S. at 77 n.8 (citing Act of Apr. 21, 1904, Ch. 1402, § 21, 33 Stat. 222) (providing for payments to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct"); see also *id.* at 91 n.4 (Stevens, J., dissenting) ("To be sure the Cherokee Delawares have recently reconstituted themselves as a recognized Indian tribe."). In any event, the court of appeals' understanding of *Weeks* would not prevent the Department from concluding that administrative and congressional actions after 1867 reflect recognition of the Delaware Tribe's status as a distinct Tribe for all purposes.

[3] After finding that the substance of the Department's 1996 decision was contrary to this Court's rulings in *Jowa nyaka* and *Delaware Tribe*, the court of appeals briefly noted its view that the decision was procedurally deficient because the Department did not use (or waive) the federal acknowledgment procedures found in 25 C.F.R. Part 83. Pet. App. 25a. That statement misperceives the nature of the issue before the Department, which was whether to correct a 1979 determination that had revoked direct dealings with the Delaware Tribe as a distinct tribal entity. The Part 83 procedures are not designed to correct such an erroneous action. See 25 C.F.R. 83.3 (a) and (b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2005

(2)

No. 04-1368

Supreme Court, U.S.
JUL 1 8 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DELAWARE TRIBE OF INDIANS,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
GALE NORTON, Secretary of the Interior, and
JAMES CASON, Acting Assistant Secretary-Indian Affairs,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENT CHEROKEE NATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether any issue of national importance is presented where the court of appeals, relying principally upon this Court's decisions in *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), determined that the Secretary of the Interior had acted arbitrarily, capriciously and contrary to law when in 1996 she officially recognized as an independent "Delaware Tribe," wholly separate from the Cherokee Nation, some descendants of Delaware Indians who pursuant to an 1867 Agreement—entered into under authority of an 1866 Cherokee Nation Treaty with the United States and approved by the President as required therein—expressly had agreed that henceforth they "shall become members of the Cherokee Nation" and whose "children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees."

2. Whether any issue of national importance is presented where the court of appeals held that the Secretary of the Interior lacked authority to create, uniquely for this case, "a procedure heretofore unknown in the law—'retract and declare'—to purportedly re-recognize the Delawares" outside the framework of the Federally Recognized Indian Tribe List Act and its implementing regulations.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the petition for a writ of certiorari.

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IN THE

Supreme Court of the United States

No. 04-1368

DELAWARE TRIBE OF INDIANS,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
GALE NORTON, Secretary of the Interior, and
JAMES CASON, Acting Assistant Secretary-Indian Affairs,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT CHEROKEE NATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (Pet. 1a-30a), as amended on denial of rehearing, is reported at 389 F.3d 1074. The opinions of the District Court for the Northern District of Oklahoma are reported at 241 F. Supp. 2d 1374 (Pet. 31a-55a) and 241 F. Supp. 2d 1368 (Pet. 56a-66a).

The opinions of the Tenth Circuit granting in part the respondent Secretary of the Interior's petition for rehearing (Pet. 67a-68a), and denying the petitioner's petition for rehearing (Pet. 69a-70a), are unreported. The Orders of the Tenth Circuit denying petitioner's application to stay the mandate, and denying petitioner's motion to recall the

mandate and for reconsideration of the denial of a stay of the mandate, are unreported and omitted from the appendix to the Petition.

The opinion of the Court of Appeals for the District of Columbia Circuit (prior to transfer of the case to Oklahoma) is reported at 117 F.3d 1489, but is omitted from the appendix to the Petition. It is reproduced here at Respondent's Appendix 1a-26a ("*infra* __a"). An earlier opinion of the District Court for the District of Columbia is reported at 944 F. Supp. 974 (D.D.C. 1996), but also is omitted from the appendix to the Petition.

JURISDICTION

The opinion of the Tenth Circuit was entered November 16, 2004, and amended February 16, 2005. The petition for a writ of certiorari was filed April 11, 2005. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Petitioner, but not the Secretary of the Interior, asks this Court to review a Tenth Circuit decision overturning the Secretary's reading of an 1867 agreement by which the Delaware Tribe of Indians was absorbed into the Cherokee Nation, and its members thereafter became Cherokee citizens.

Because the Tenth Circuit's decision exclusively involves matters peculiar to that unique 1867 agreement, concerns only the Cherokee Nation and some of its citizens, and is consistent with all decisions of this Court (as well as of the D.C. Circuit and the former Court of Claims) interpreting that agreement over the course of 112 years, the petition for a writ of certiorari should be denied.

Petitioner strains to invent a basis for review where none exists. Petitioner's characterization cannot change the basic fact, both recognized and conceded below (*e.g.* Pet. 6a, 6a n.2), that this case turns solely upon the proper meaning of a

sui generis 1867 agreement between only two parties—a "contract," as this Court repeatedly noted in *Cherokee Nation v. Journeycake*, 155 U.S. 196, 212, 215, 216 (1894)—and, therefore, those are the only parties whose rights possibly can be affected by the court of appeals' decision. Nor can petitioner's mis-characterization of prior decisions of this Court and of the lower courts alter the immutable fact that "*every court* to consider the actual terms of the 1866 Cherokee Treaty and 1867 Agreement has explicitly or implicitly rejected the [Secretary's] reading of the [1867] agreement." Pet. 12a, citing six decisions including *Journeycake*, *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), and the D.C. Circuit's earlier decision in this case prior to its transfer to Oklahoma, *Cherokee Nation v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997) (*infra* 1a-26a). Indeed, far from supporting a case for review, the substantively identical decisions of two Circuit courts in this very case on precisely the same issues—first the D.C. Circuit (where petitioner participated fully) and now the Tenth Circuit—militates heavily against allocating this Court's scarce resources here. Petitioners have not just had their day in court, they have had it twice.

Petitioner's argument for review is equally insubstantial when it asserts a claimed inconsistency between the judgment below and this Court's decision in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977). Here again the Tenth and D.C. Circuits both rejected that very contention, *see* Pet. 23a-24a; *infra* 24a, explaining with care that *Weeks* involved strictly the pursuit of pre-1867 breach of treaty claims, not the proper interpretation of the 1867 Agreement. Even the Secretary long ago rejected petitioner's position on *Weeks*, which helps explain why the Secretary never relied on *Weeks* as a basis for declaring petitioner to be a federally recognized tribe. Read fairly, and as the landmark COHEN'S HANDBOOK ON FEDERAL INDIAN LAW (1982) accurately observes, *Weeks* concerns but a classic example of an Indian Tribe that has

long ago voluntarily relinquished its own sovereignty and separate recognition, but that retains the continuing right to vindicate ancient "tribal" claims under treaties predating that relinquishment. Pet. 23a-24a (citing COHEN at 12 & 12 n.64). *See also infra* 23a-24a (also citing COHEN). Thus, even if this case involved more than the Cherokee Nation and some of its citizens (and it does not), there exists no conflict between the Tenth and D.C. Circuit's decisions and any decision of this Court.

Petitioner's newly-minted "disastrous consequences" argument as a reason for review (Pet. 21) is both improper and disingenuous. It is improper because it seeks to inject into this agency review action a non-record, self-serving affidavit that was first created only when petitioner applied unsuccessfully to this Court for a stay of the Tenth Circuit's mandate. Pet. 21 n.8. It is disingenuous because it runs directly against a finding, made upon petitioner's own representation, that "[a]ll persons eligible for membership in the Delaware Tribe of Indians are also eligible for membership in the Cherokee Nation of Oklahoma."[1] Each of petitioner's members thus enjoys (or has the right to enjoy) all privileges and immunities of Cherokee citizenship, as expressly provided for under the 1867 Agreement (Pet. 95a) and the Cherokee Nation Constitution (AR 7-1141).[2]

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[1] *Appeal of Delaware Tribe of Indians*, IBIA No. 02-65-A, ALJ Recommended Decision, at 11 (Finding 20) (July 26, 2002), *at* (http://www.ibiadecisions.com/lsda/isdacases/20020726-0265a.PDF), *accepted and declared final* by Order Notifying Parties of Finality of Recommended Decision (Int. Bd. Indian App. Sept. 24, 2002).

[2] As used herein, "AR" refers to the Administrative Record filed in the district court, "10th Cir. APP" refers to the Appellant's Appendix (excerpts of the Record), "10th Cir. ADD" refers to the Addendum to the Appellant's Opening Brief, "10th Cir. SUPPADD" refers to the Addendum to the Appellant's Reply Brief, and "10th Cir. 2dSUPPADD" refers to the Addendum to the Appellant's Supplemental Brief.

Finally, there is no substance to petitioner's argument that the Tenth Circuit's decision somehow jeopardizes the recognition of other Indian tribes. The Tenth Circuit's alternative ruling on this issue was expressly based upon the fact that "[t]he [Secretary] *used a procedure heretofore unknown to the law—'retract and declare'*—to purportedly re-recognize the Delawares." Pet. 25a (emphasis added). A ruling striking down an unprecedented and extreme departure from settled procedure certainly does not jeopardize the status of other Tribes recognized through less irregular means.

STATEMENT OF THE CASE

1a. The facts as related by the Tenth and D.C. Circuits are undisputed. After the Civil War, the Delaware Tribe of Indians (which in 1829 had been forced to relocate to Kansas) faced increasing pressure from the United States and white settlers to move once again. Pet. 7a; *infra* 2a. The United States then entered into a treaty with the Delawares under which their land in Kansas would be sold. *Treaty with the Delawares*, July 4, 1866, 14 Stat. 793. Article 3 of that Treaty granted all Delaware Indians "an opportunity, free from all restraint, to elect whether they will dissolve their relations with their tribe and become citizens of the United States." *Id.* (The Delawares who elected under Article 3 to sever all relations with any Indian Tribe are referred to herein as the "Kansas Delawares.") Alternatively, in Article 4 the United States promised to sell to those Delawares who instead wished to move south, certain lands in what was then "Indian country" (now Oklahoma) that either had been ceded to the Government by other Indian tribes or "which may be ceded by the Cherokees . . . , to be selected by the Delawares in one body in as compact a form as practicable." *Id.*; Pet 77a.

Later in 1866, the United States entered into a treaty with the Cherokee Nation. *Treaty with the Cherokee*, July 19, 1866, 14 Stat. 799. Article 15 of the Cherokee Treaty provided two means by which non-Cherokees might settle

upon certain Cherokee lands, what the court of appeals called: (1) "an 'incorporation option,'" Pet. 8a (or, as this Court in *Journeycake* put it, an "absorption" option, 155 U.S. at 204), and (2) a "'preservation option,'" Pet. 8a. As to the "incorporation"-"absorption" option, Article 15 (together with a generic introduction) provided:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: *Should any such tribe or band of Indians settling in said country abandon their tribal organization*, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in Cherokee country, *they shall be incorporated into and ever after remain a part of the Cherokee Nation*, on equal terms in every respect with native citizens.

Pet. 78a-79a (emphasis added). Alternatively under the "preservation option," settling tribes wishing to "preserve their tribal organizations, and to maintain their tribal laws, customs and usages" were required to make a population-based payment and to purchase "a district of country set off for their use by metes and bounds." Pet. 79a.[3]

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[3] As the Tenth Circuit noted (Pet. 9a), Option 2 provided in full:

> "And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have *a district of country set off for their use by metes and bounds* equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and

Thus, while the 1866 Treaty permitted the Cherokee Nation and a settling tribe some flexibility in setting the terms of their relationship, it offered only two basic alternatives, either of which "had to be 'consistent' with one of the [two] options" (Pet. 18a): Option 1, incorporation and absorption into the Cherokee Nation and the permanent loss of separate tribal political identity, or Option 2, purchase of a distinct body of land for the settling tribe and continued separate political existence.

b. On April 8, 1867, the Cherokee Nation and the Delaware Tribe entered into Articles of Agreement under which the Delawares[4] agreed to settle in Cherokee country. Pet. 91a-96a. The Agreement recited that it was authorized "'pursuant to Article 15 of the 1866 Cherokee Treaty'" (Pet. 10a, quoting same), and not Article 4 of the Delaware Treaty.[5] The 1867 Agreement also three times recited that

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> "[1] shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States....
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> "[2] And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees."

[4] In this Brief the term "Delawares" or "Cherokee-Delawares" refers to those Delawares who moved to Cherokee country. It does not include the "Kansas Delawares" or other Delawares who settled elsewhere in Oklahoma.

[5] The 1867 Agreement mentions Article 4 of the Delaware Treaty (which contemplated the purchase "in one body in as compact a form as practicable" of lands ceded by the Cherokees), but explains that this Delaware Treaty provision could not be implemented according to its terms because "no such cession of land was made by the Cherokees to the United States, but, in lieu thereof, terms were provided as hereinbefore

the Delawares were thereby "consolidat[ed]" or "incorporated" into the Cherokee Nation (Pet. 92a, 93a, 95a), matching Article 15's incorporation-absorption option. It then concluded:

> "On fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, *shall become members of the Cherokee Nation*, with the same rights and immunities, and the same participation (and no other,) in the national funds, *as native Cherokees*, save as hereinbefore provided. And the children hereafter born of *such Delawares so incorporated* into the Cherokee Nation, shall *in all respects be regarded as native Cherokees.*"

Pet. 11a, quoting 1867 Agreement (Pet. 95a). This closing paragraph perfectly matched Article 15's provision that the members of a tribe choosing to "abandon [its] tribal organization" would become "incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens."[6] Pet. 78a-79a. Just as significantly, and unlike Article 15's preservation option, the 1867 Agreement did not provide for the Delawares to acquire "a district of country set off for their use by metes and bounds" (Pet. 79a), but provided for the purchase by

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mentioned, under which friendly Indians might be settled upon their [*i.e.*, Cherokee] lands." Pet. 91a-92a.

[6] The 1867 Agreement's language regarding one of the payments the Delawares would make is nearly identical to Article 15's like provision under the incorporation-absorption option. *Compare* Pet. 93a-94a ("a sum of money, which shall sustain the same proportion to the existing Cherokee National fund, that the number of Delawares registered as above mentioned, and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation") *with* Pet. 79a ("a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country").

individual Delawares of temporary 160-acre life estates anywhere throughout Cherokee country. Pet. 92a-93a.[7]

As required by Article 15, the 1867 Agreement was approved by the President. In transmitting the Agreement to the President, Interior Secretary Browning described it as "providing for *uniting the two tribes, as contemplated by the Cherokee Treaty of July 19, 1866* . . . ," a result only possible under Article 15's incorporation-absorption option. 10th Cir. APP 296 (emphasis added) (Presidential approval omitted from petitioner's appendix). *See also* Pet. 22a n.6 and 10th Cir. APP 298-319 (statements by Delaware leaders explaining the Agreement provided for "merging" the formerly separate tribes into one).

c. In the years following execution of the 1867 Agreement disputes arose between the Cherokee Nation and the settled Delawares. One dispute involved the rights of the Cherokee-Delawares (and also the Cherokee-Shawnees, descendants of another tribe incorporated into the Cherokee Nation) to share as Cherokee citizens in the proceeds of certain "Cherokee lands west of the Arkansas River." Act of Oct. 19, 1888, ch. 1211, 25 Stat. 608. In this dispute, "the Cherokee legislature . . . over the veto of the [Cherokee] principal chief" directed that the land proceeds be paid only "to the citizens of the Cherokee Nation by blood," thus excluding the Delawares and Shawnees. *Id.* In 1888 Congress responded by directing that appropriate sums from the Treasury owing to the Cherokees be redirected to the Delawares and Shawnees. *Id.* at 609. In so enforcing the 1867 Agreement, Congress recited that under Article 15 of the Cherokee Treaty "the Indians thus settled were . . . to be *incorporated into and ever after remain*

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[7] The additional purchase of these temporary life estates exceeded the minimum requirements of the incorporation-absorption option, but was not inconsistent with it. In contrast, incorporation and the acquisition of scattered life estates was plainly *in*consistent with the preservation option.

a part of the Cherokee Nation, on equal terms in every respect with native [Cherokee] citizens"—a verbatim reference to Article 15's incorporation-absorption option. *Id.* at 608 (emphasis added). The 1888 Act also recited that the Cherokees had entered into two agreements with the Delawares and the Shawnees "under the provision of the aforesaid fifteenth article," *id.*, adding that the Delawares and Shawnees had thereby each been "*incorporated into the Cherokee Nation*," *id.* at 609 (emphasis added), another verbatim reference to that article's incorporation-absorption option.[8]

d. Notwithstanding Congress' corrective action in 1888, disputes between the Delawares and the Cherokee Nation continued, next over the "proceeds from the rental of certain Cherokee land." *Infra* 5a. This time Congress authorized the Delawares (like the Shawnee) to bring suit "to hear and determine what are the just rights . . . of the . . . Delaware Indians, who are settled and *incorporated into the Cherokee Nation* . . . under the provisions of article fifteen of the [Cherokee Treaty] . . . and articles of agreement . . . made with the Delaware Indians April [8, 1867]," yet another reference to Article 15's incorporation-absorption option. Act of Oct. 1, 1890, ch. 1249, 26 Stat. 636 (emphasis added).

Delaware Chief Charles Journeycake, in a representative capacity on behalf of the Delawares, then sued the Cherokee Nation and the United States to establish the Delawares' rights as full Cherokee citizens. Pet. 14a n.4. The Complaint averred that the Delawares had by the 1867 Agreement "abandoned their separate tribal organization" (10th Cir. 2dSUPPADD 8), a key point on which the Court of Claims

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[8] The parties agree that the Shawnee Tribe was incorporated into the Cherokee Nation under Option 1 of the Cherokee 1866 Treaty and thereby surrendered its independent sovereignty. Pet. 18.

agreed in sustaining the Delawares' rights as full Cherokee citizens:

> The agreement of 1867, which we have been considering as a mere contract, was something more than a deed of bargain and sale, viz, a treaty. . . . *By this treaty two independent bodies politic united and became one, the lesser, according to its terms, being merged in the greater.* The compact regulated and guaranteed the individual and political rights of those who *surrendered their independent corporate existence* and became members of the Cherokee nationality.

Journeycake v. Cherokee Nation, 28 Ct. Cl. 281, 311 (1893) (emphasis added). *See also* Pet. 12a (quoting same).

In affirming the Court of Claims in all respects, this Court focused on Article 15's two options:

> One in which the Indians settled should *abandon their tribal organization, in which case, as expressed, they were to 'be incorporated into, and ever after remain a part of, the Cherokee Nation, on equal terms in every respect with native citizens.'* The other was where removal of the tribe to the Cherokee country should involve no abandonment of the tribal organization, in which case a distinct territory was to be set off, by metes and bounds, to the tribe removed. *The one contemplated an absorption of individual Indians into the Cherokee Nation; the other, a mere location of a tribe within the limits of the Cherokee Reservation.*

Journeycake, 155 U.S. at 204 (emphasis added). Having so characterized the two options, this Court concluded that the 1867 Agreement unambiguously implemented the first option, reflecting "*the expressed thought of a consolidation of these Delawares with, and absorption of them into, the Cherokee Nation as individual members thereof.*" *Id.* at 213 (emphasis added).

Far from skirting the issue, *e.g.*, Pet. 8, 14, this Court expressly considered and held that the Delawares did not come into Cherokee territory under the "preservation" option, explaining that "[t]here is no provision for the setting apart of a distinct body of land in any portion of the reservation for the Delaware tribe," *Journeycake*, 155 U.S. at 205-206, and adding later that "[i]n other words, there was no purchase of a distinct body of lands, as in the case of the settlement of other tribes as tribes within the limits of the Cherokee Reservation." *Id.* at 213 (emphasis added). This Court could not have spoken more clearly to the very point the petitioner now seeks to relitigate a century later.[9]

e. When conflicts over the 1867 Agreement persisted, Congress once again authorized the Court of Claims to determine the nature of the parties' rights—this time, the nature of the Delawares' occupancy rights. Act of June 28, 1898, ch. 517, sec. 25, 30 Stat. 495, 504. For this lawsuit the Delawares shifted to arguing they had acquired rights superior to those of other Cherokee citizens, including permanent land rights that no other citizen enjoyed, based on the underlying proposition that they had come into Cherokee country under the preservation option—the precise opposite

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[9] To continue insisting that this issue was not decided is untenable. So, too, is it untenable to continue arguing that this Court did not consider the meaning of the Delawares' second payment under the 1867 Agreement: not once, but *twice*, this Court in *Journeycake* explained that the second payment purchased temporary life estates anywhere on the Reservation, guaranteed minimum future allotments, and purchased an undivided interest in the balance of the Cherokee Nation's lands. 155 U.S. at 212-13, 215. The Court's central holding that the Delawares had a right to share in the proceeds earned on Cherokee lands hinged *directly* on that second payment, with the Court explaining at length that one dollar per acre might have been far too much for mere temporary life estates, but not for the considerably larger interest the Delawares thereby acquired in other Cherokee lands. *Id.* at 215. For the Tenth Circuit's comparable analysis, *see* Pet. 15a, 21a.

of their contention in *Journeycake*. But the Court of Claims disagreed, concluding that the settling Delawares acquired a mere right of occupancy of individual parcels for their own lifetimes, just as other Cherokee citizens possessed, and not an inheritable right that no Cherokee citizen enjoyed. *Delaware Indians v. Cherokee Nation*, 38 Ct. Cl. 234, 247-53 (1903). The court specifically rejected the notion that the 1867 Agreement brought the Delawares into Cherokee territory under the preservation option (*id.* 247-48):

> The [Cherokee] treaty of 1866 provided in substance that in case any tribe settling in the country should decide to preserve their tribal organization and maintain their laws and customs, they should have a district of country set off by metes and bounds equal to the 160 acres of land for each man, woman, and child of said tribe. But no such provision is found in the agreement or treaty of 1867.

Once again this Court affirmed, agreeing "the Delawares were made a part of the Cherokee Nation," and they became "a component part upon equal terms with other citizens." *Delaware Indians*, 193 U.S. at 144. The Court expressly rejected "[t]he claim . . . that the contract of 1867 secured . . . to the Delawares *as a tribe*, the 157,000 acres of land," *id.* at 134 (emphasis added). Relying on *Journeycake*, the Court explained that no tribal rights survived the Delawares' entry on to Cherokee lands:

> In [*Journeycake*] it was held that under the agreement *the registered Delawares were incorporated into the Cherokee Nation*, and as members and citizens thereof were entitled to participate in the proceeds of the sale of a portion of the Cherokee lands upon equal terms with native Cherokee citizens.
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> . . .
>
> It was held in the *Journeycake Case*, to be the purpose of this agreement *to incorporate the registered Delawares*

> *into the Cherokee Nation*, with full participation in the political and property rights of citizens of that nation. As a part of the general agreement, provision is made for rights in certain lands as a home for the Delawares who are to remove from their Kansas lands to the Indian territory. These lands are to pass to registered Delawares and they are to have the privilege of selecting them from unoccupied lands east of the line 96 degrees west longitude. *This right is conferred not upon the Delaware Nation, but upon certain registered Delawares who are to be incorporated into the Cherokee Nation.*

Id. at 134-35 (emphasis added). In so holding, this Court unambiguously rejected the Delawares' contention, resurrected here, that they came into Cherokee country under the preservation option. On this point there was no quibbling, for the Court made plain that there is no "latent ambiguity in the terms of the contract." *Id.* at 141.[10]

2a. Throughout the late 19th Century and for most of the 20th Century, the Secretary and the Department continued to view the Delawares as having merged with the Cherokee Nation for all purposes, save for the pursuit of ancient breach of treaty claims pre-dating the 1867 Agreement (and the expenditure of awards secured upon such ancient claims). An early example is found in *Delaware Indians in Cherokee Nation–Allotment*, 25 Pub. Lands Dec. 297 (1897), where the

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[10] As the Tenth Circuit summarized (Pet. 17a, citations omitted),

> The Delawares nevertheless insisted the 1867 Agreement "should not be literally enforced in view of the understanding of the parties[]" and sought to introduce parol evidence. The Court, however, found the contract unambiguous and rejected the Delawares' resort to parol evidence. The Court explained "no room" existed in the case to "depart[ ] from the familiar rules of law protecting written agreements from the uncertainties of parol testimony." "In light of the circumstances and the language used in the writing, its construction [was] not rendered difficult because of latent ambiguities."

Department's Attorney General, with the Secretary's approval, anticipated the outcome in this Court in *Delaware Indians* by opining that the 1867 Agreement "was . . . a compact for the consolidation of two separate and distinct bodies politic by which *they became united in one*. By its terms the Delawares, or that portion of that tribe which saw fit to accept the agreement, *were merged in and became a component part of the body politic of the Cherokee Nation*." *Id.* at 302 (emphasis added); 10th Cir. SUPPADD 8. Later opinions are to a similar effect.[11]

b. Over the years the Delawares continued to pursue historic claims against the Government arising out of treaties pre-dating their 1867 merger into the Cherokee Nation. For these purposes the Delawares would establish various tribal committees which served to present their claims against the Government in the name of the historic "Delaware Tribe of Indians" and, if successful, to later administer judgment funds awarded on such claims as the lineal descendants of that historic entity. *E.g.*, Act of February 27, 1925, 43 Stat. 812, *as amended by* Act of March 3, 1927, Pub. L. 69-717, ch. 314, 44 Stat. 1358. One such claim, involving an 1854 land transaction, was prosecuted under the Indian Claims Commission Act of August 13, 1946, Pub. L. 79-726, ch. 959, 60 Stat. 1049, as amended, *formerly codified at* 25 U.S.C. §§ 70-70v-3 ("ICCA"), and resulted in a substantial recovery *Absentee Delaware Tribe of Oklahoma, et al. v. United States*, 21 Ind. Cl. Comm. 344, 370 (1969). (The ICCA authorized suits against the United States not only by

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[11] *See e.g.*, 10th Cir. APP 403 (1952 Solicitor's Opinion); APP 571 (1982 Solicitor's Opinion); APP 296 (1867 Message to the President); APP 329, 330 (1886 statements of President Cleveland and Secretary Lamar); APP 486 (1978 BIA correspondence); APP 499 (1979 BIA correspondence); APP 516 (1980 House Report restating BIA position); AR 4-0282 (1981 BIA opinion); APP 535-37, 592-98 (Secretary's 1981 & 1983 briefs); and APP 624 (1994 BIA correspondence).

tribes and bands, but also by any "other identifiable group of American Indians." 60 Stat. at 1050, § 2, *formerly codified at* 25 U.S.C. § 70a.)

The proper distribution of that award gave rise to yet another Delaware case that ultimately made its way to this Court, albeit one in which the Cherokee Nation was not a party. In *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), lineal descendants of the "Kansas Delawares"—those who in a legal sense elected to cease being Indians under Article 3 of the 1866 Delaware Treaty (*supra* 5)—challenged Congress' limitation on the distribution of Delaware judgment funds exclusively to the Delawares who had moved to Cherokee country (and to the Absentee Delawares who had moved elsewhere in Oklahoma). Before addressing Congress' distribution plan, this Court (without supporting citation) observed in passing that the Delawares "are today a federally recognized tribe." *Weeks*, 430 U.S. at 77. At the same time, however, the Court recognized that Congress hitherto had treated the Delawares only as "a distinct entity" in the historic pre-1867 treaty claims setting, and it acknowledged that "[t]he District Court made no finding as to the Cherokee Delawares' status as a recognized tribe." *Id.* at 77 n.8. The *Weeks* decision is discussed at greater length *infra* 25-28, because it is the centerpiece of the petition.

3a. During the 1970s the Interior Department came under considerable criticism over its *ad hoc* non-regulatory process for according official political recognition to tribal governments. *E.g.*, American Indian Policy Review Commission, FINAL REPORT at 477-79 (GPO 1977). (The Commission was established by Pub. L. 93-580, 88 Stat. 1910 (1975), as amended.) In response, the Department in 1978 standardized its procedures for according such recognition by adopting formal tribal acknowledgment regulations. 25 C.F.R. pt. 54 (1979), *redesignated* 25 C.F.R. pt. 83. Proceeding under these regulations, on January 31, 1979, the Department issued

its first comprehensive and official list of "Indian tribal entities that have a government-to-government relationship with the United States." 44 Fed. Reg. 7,235 (Feb. 6, 1979). Like most available pre-regulation lists, the new list included the Cherokee Nation but not the Delawares. *Id.*[12]

The Bureau of Indian Affairs (BIA) subsequently issued seven listings of recognized tribes, all including the Cherokee Nation and all omitting the Delawares. *See* 46 Fed. Reg. 35,360 (July 8, 1981); 47 Fed. Reg. 53,130 (Nov. 24, 1982); 48 Fed. Reg. 56,862 (Dec. 23, 1983); 50 Fed. Reg. 6,055 (Feb. 13, 1985); 53 Fed. Reg. 52,829 (Dec. 29, 1988); 58 Fed. Reg. 54,364 (Oct. 21, 1993); and 60 Fed. Reg. 9,250 (Feb. 16, 1995). As the Tenth Circuit correctly noted (and as petitioner oddly contests, Pet. 8-9), "[t]he Delawares had never been on the list prior to this lawsuit," Pet. 2a (referring to the list issued under 25 C.F.R. § 83.5(a)).

From the promulgation of its Part 83 regulations in 1978 until 1996, the Department consistently took action on the basis that the Delawares were *not* a separately recognized tribe. 10th Cir. APP 486, 490, 491, 496, 497, 499, 501, 505, 507, 511, 523, 526, 571, 617, 618, 621, 624, 629. On February 26, 1979, for example, the BIA's Washington office wrote Henry Secondine, Chairman of the Delaware Business Committee, about "the relationship between the Delawares and the Cherokee Nation" (APP 490) explaining:

> It is clear that by the 1867 Agreement, certain Delaware Indians . . . became a part of the Cherokee Nation. . . .

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[12] According to the record, three out of four of the agency's unofficial pre-1979 lists in the previous decade excluded the Delawares. *See* 10th Cir. APP 435 (1973); APP 451 (1972); APP 256 n.12 (discussing a 1969 list). A fourth unofficial list included the "Cherokee-Delaware Business Committee," APP 470 (1978), although its significance is muddied by the fact that many of the unofficial pre-1979 lists expressly included Indian groups "recognized only for purposes of settling claims against the U.S. Government." APP 436, 437.

> [W]e consider the Cherokee Delawares to be . . . within the Cherokee Nation. The Cherokee Delawares are free to take necessary action to deal with their judgment awards and to preserve their Delaware identity. For governmental purposes, however, they must look to the Cherokee Nation of which they are an integral part.

In May 1979, an Acting Deputy Commissioner of the BIA wrote another letter to Mr. Secondine, notifying him that the BIA was withdrawing its prior approval of the Delaware Business Committee's by-laws (under development to administer a treaty claims judgment) because it was "not capable of adequately protecting the interests of the Cherokee Delaware people" (as was required in an appropriations law providing for the payment of the Delaware judgment). APP 499. The letter summarized the BIA's position on the Delawares' status, stating that its prior dealings with the Business Committee with respect to pre-1867 treaty claims had led to "misunderstandings" by some persons that those dealings "established for the Delawares a relationship with the Federal Government separate from that of the Cherokee Nation; such is not the case." *Id.* The May 1979 letter has since taken on added significance because its 1996 "re-traction" by the Assistant Secretary became the "heretofore unknown in the law" device the Department employed to extend separate recognition to the Delawares. Pet. 25a; *infra* 17a.

b. Notwithstanding the Department's prior settled position, "[t]he Delawares began a quest for Federal recognition in 1992." Pet. 2a. They filed a letter of intent to petition the Department for federal acknowledgment as a tribe under 25 C.F.R. pt. 83. *Id.* The Department initially refused to consider the petition, explaining the "Delawares have not existed as an independent political identity since 1867, and have been absorbed into the Cherokee Nation of Oklahoma for general governmental purposes since that time." Pet. 2a. But the Department subsequently clarified the Delawares'

right to file a formal petition if it so chose Pet. 2a-3a. Then, instead of following through with a petition, the Delawares abruptly bypassed the process altogether by simply asking the Department to "reconsider and retract" the agency's position not to deal with the Delawares as a separate federally recognized tribe. Pet. 3a. "The agency [then] conducted a 'legal review' of the situation at the Delawares' behest" (*id.*), preparing a new legal opinion which concluded that in 1867 the Delawares actually had preserved their independent sovereignty, purportedly having acted under the "preservation option" rather than the "incorporation"-"absorption" option of the 1866 Cherokee Treaty. All this the Secretary's "detailed analysis" reasoned in one short footnote.[13] After 30 days notice of that legal opinion, the Secretary then issued a September 1996 decision retracting the May 1979 letter (*supra* 18) and declaring on that basis that the Delawares never stopped being a federally recognized tribe. *Id.* (Contrary to the Petition at 2, there never was any "hearing" on the matter.)

4a. In October 1996 the Cherokee Nation brought suit in the District of Columbia under 5 U.S.C. §§ 701-706 of the Administrative Procedure Act to overturn the Secretary's recognition decision as arbitrary, capricious and contrary to law. The district court granted the Secretary's motion to dismiss on indispensable party grounds, holding the Delawares could not be joined due to tribal sovereign immunity. 944 F. Supp. 974, 986. On appeal the D.C. Circuit reversed, explaining in a lengthy and carefully considered opinion that: (1) the Secretary's decision to accord recognition to the Delawares was not entitled to deference on the sovereign immunity issue because "the Department did not follow the

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[13] "The agency's decision to extend recognition to the Delawares rested on an alleged 'comprehensive legal analysis' that devoted three sentences, in a footnote, to the Supreme Court's decisions interpreting the 1866 Cherokee Treaty and 1867 Agreement." Pet. 25a.

Part 83 regulations, but recognized the Delawares through the procedural device of retracting the May 24, 1979, non-recognition letter. An agency is required to follow its own regulations" (*infra* 17a, citing, *inter alia*, *Service v. Dulles*, 354 U.S. 363, 388 (1957); (2) deference was also not due where the issue was purely a question of law involving the meaning of the 1867 Agreement, *Journeycake* and *Delaware Indians* (Pet. 17a-18a); (3) deference could not trump the presumption of reviewability (*id.* 18a, citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)); (4) the Delawares in 1867 abandoned their separate sovereignty under Option 1 of the Cherokee Treaty, reasoning that "[t]he use of the term 'incorporated' in the 1867 Agreement is sufficiently unambiguous to constitute an express relinquishment of the Delawares' status as a separate sovereign" (Pet. 22a), adding that "[t]he plain meaning of this language is that the two tribes were to be consolidated into a single unit" (*id.* 23a); and (5) "*Weeks* cannot be so broadly read as to resolve the issue in the instant appeal. Nothing in the Court's opinion suggests that it was revisiting its earlier conclusion in *Delaware Indians* and *Journeycake* that the Delawares had been 'incorporated' into the Cherokee Nation" (*id.* 24a). Through a subsequently added footnote the Court limited its opinion to the indispensable party issue. *Id.* 26a n.15.

b. Subsequent to remand the action was transferred to the Northern District of Oklahoma (Pet. 4a) where the district court relied on *Weeks* and on the claims statute there at issue to conclude that the Secretary did not violate the APA (Pet. 56a). Significantly, the court omitted any substantive discussion of the 1867 Agreement, *Journeycake* or *Delaware Indians*.

c. On appeal the Tenth Circuit reversed, detailing with even greater care the analysis undertaken by the D.C. Circuit. The Court took note that "the agency's recognition of the Delawares was based solely on its *analysis of the treaties and*

agreements entered into by the Cherokee Nation and Delawares in the 1860s" (Pet. 6a), and therefore the agency's decision would have to stand or fall on that analysis. Since the Secretary's "'review' of its administrative practice over the next century was simply to confirm the Delawares' status" as being what the Secretary already had concluded it to be under the 1867 Agreement, the case presented a pure question of law on issues where Congress did not confer on the Secretary any discretion. Pet. 6a-7a, citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), *superceded by* 29 U.S.C. § 1854.[14]

Next, the court of appeals reviewed all the extant case law stretching from the *Journeycake* opinions to the D.C. Circuit's opinion here and concluded that in all these cases the Delawares had been conclusively found to have abandoned their separate sovereignty as of 1867 and been fully absorbed into the Cherokee Nation. Pet. 12a ("*every court* to consider the actual terms of the 1866 Cherokee Treaty and 1867 Agreement has explicitly or implicitly rejected the DOI's reading of the agreement"), 17a-18a ("[b]ased on the foregoing, the [Secretary's] conclusion the Delawares preserved their tribal identity under the 1866 Cherokee Treaty and 1867 Agreement is *clearly* contrary to Supreme Court precedent"), 18a ("'An agency . . . *must* conform its conduct to a decision of the Supreme Court in all future cases, even if the agency believes that the Court was wrong'" (citation omitted)), 25a ("The [Secretary's] recog-

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[14] Since the Secretary did not rely on post-1867 events to conclude that the Delawares preserved their separate sovereignty under the 1867 agreement, the court of appeals limited its review to what the Secretary had decided. Pet. 6a n.2, citing *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974) and *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Thus, the court of appeals expressly refrained from passing upon most of the arguments the petitioner now advances, reserving petitioner's right to raise them in any future agency proceedings.

nition of the Delawares in this case was contrary to the United States Supreme Court's decisions in *Journeycake* and *Delaware Indians*").

Even then, the court of appeals indulged the petitioner by reviewing the pertinent treaties and the 1867 Agreement *ab initio* (as did the D.C. Circuit), only to confirm once again that "[t]he unambiguous language of the 1867 Agreement, including the provisions for the Delawares' two payments, is consistent with the Delawares' selection of the incorporation option of Article 15." Pet. 18a. *See also* Pet. 19a ("the language of the agreement and the nature of its execution are inconsistent with Article 15's preservation option"), 19a ("the agreement's language is unambiguous"), 20a ("[a]bsolutely nothing in the administrative record supports the Delawares' theory" that they "selected and settled upon a ten-by-thirty tract of land in the Cherokee Nation"), 21a ("the [Secretary's] theory that the Delawares' two payments to the Cherokee Nation evidences 'preservation' rather than 'incorporation' is misguided"). After examining the petitioner's and the Secretary's additional arguments in favor of considering improper parol evidence, the court of appeals explained that "*assuming* for the moment the agreement is ambiguous (which it is not) and the Supreme Court had not held it unambiguous (which it did), the Delawares would still not be in any better position. The parties' contemporaneous actions evidenced their belief the Delawares incorporated into the Cherokee Nation." Pet. 22a.

Finally, the court of appeals rejected petitioner's "misplaced" reliance on this Court's decision in *Weeks*. Pet. 23a. After noting the distinction between a modern day entity pursuing an ancient "tribal" claim and a genuine modern-day recognized tribe (Pet. 23a-24a, quoting COHEN at 12 (citing the Delawares)), the court concluded that "[a]t most, *Weeks* stands for the proposition the Delawares reconstituted for claims purposes." Pet. 24a. As for the argument that

subsequent actions restored the Delawares' sovereignty after 1867, be they drawn from the statute at issue in *Weeks* or elsewhere, the court was careful to note again that since the Secretary had not relied upon such subsequent actions for her recognition analysis, the court likewise could not consider such actions, much less sustain the Secretary's decision as if it were based upon them. *Id.* ("[w]hether the Delawares were reconstituted–be it through Act of Congress or administrative practice–sometime after 1867 is not before us"). Indeed, the Secretary–who has not petitioned this Court–"conceded" that the basis for the Secretary's decision was strictly the 1867 Agreement and the related treaties. Pet. 6a n.2.

In its concluding paragraph the court of appeals further faulted the Secretary for failing to follow the agency's own regulatory procedures, Pet. 25a, criticizing the agency for using "a procedure heretofore unknown to the law—'retract and declare'—to purportedly re-recognize the Delawares. In so doing, the [Secretary's] actions were arbitrary and capricious."

Judge Seymour concurred in the judgment, "agree[ing] with my colleagues that the Supreme Court's decisions in [*Journeycake* and *Delaware Indians*] control the outcome of this controversy," and adding that "after a very careful and particular examination of the Supreme Court's decisions in *Journeycake* and *Delaware Indians* in conjunction with an equally careful examination of the treaties and agreements they interpret, . . . one must conclude this controversy should be resolved in favor of the Cherokee Nation." Pet. 26a.

REASONS FOR DENYING THE PETITION

1. As the foregoing discussion makes plain, this case involves the unique relationship between the Cherokee Nation and the Delawares, as reflected in their 1867 Agreement read against the backdrop of their respective 1866 treaties. The agency action below was based solely upon a

legal opinion which (1) analyzed those historic documents as preserving separate Delaware sovereignty after 1867, rather than effecting its abandonment; and (2) construed this Court's *Journeycake* and *Delaware Indians* decisions in three sentences to have somehow failed to address the issue.

That is what the legal opinion said, that is what the Secretary conceded, and that is the core question the court of appeals addressed. Consequently, and as the Tenth Circuit noted, all the petitioner's contentions about subsequent events are for another day and another proceeding. As this Court's decisions in *FPC v. Texaco Inc.* and *Motor Vehicle Mfrs.* teach, an agency action must stand or fall "'on the same basis articulated . . . by the agency itself,'" *Texaco*, 417 U.S. at 397 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962)), and therefore "an agency's action must be upheld if at all, on the basis articulated by the agency itself," *Motor Vehicle Mfrs.*, 463 U.S. at 50 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Courts cannot speculate about additional reasons that might sustain an otherwise plainly illegal action. Surely petitioner cannot be asking this Court to cast aside that time-honored principle of administrative law—although that is precisely what the petition effectively seeks.

The Tenth Circuit's appropriately narrow scope of review underscores the fact that this case involves only matters peculiar to the 1867 Cherokee-Delaware Agreement, and it concerns only the relationship between the Cherokee Nation and some of its citizens. Such a case does not warrant further review in this Court, all the more so given its absolute fealty to 112 years of precedent interpreting that Agreement, including this Court's express and unambiguous determinations in *Journeycake* and *Delaware Indians* that the

Delawares came to Cherokee country under the "absorption"—"incorporation" option.[15]

2. The petitioner's attempt to make a case for review based upon *Weeks* is untenable. First, the Secretary's decision below never rested upon *Weeks* (or anything else after 1867), so it can hardly now form a proper basis for sustaining it. *Supra* 23-24. ("Whether the Delawares were reconstituted—be it through Act of Congress or administrative practice–sometime after 1867 is not before us." Pet. 24a.)[16] Second,

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[15] The court of appeals did not err in declining to defer to the Secretary's erroneous reading of *Jouneycake, Delaware Indians* and the 1867 Agreement. Pet. 21-25. An agency's decision on a point of law is entitled to no deference when it is "clearly wrong." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004), discussed at Pet. 5a-6a; *infra* 17a-18a ("[i]f the Department acted contrary to law, the Final Decision would be owed no deference"). Any case for deference is further weakened when account is taken of the Secretary's failure to follow settled procedure. Pet. 5a; *infra* 17a; *see also Miami Nation of Indians of Ind., Inc. v. United States Dep't of Interior*, 255 F.3d 342, 348 (7th Cir. 2001) (involving once-recognized Miami Nation and noting the Part 83 regulations have "canalize[d]" the agency's discretion by establishing "'legal'" criteria that are "obligatory"); *Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993) (involving once-recognized Western Shoshone Tribe and noting that the Part 83 regulations have "eclipsed" the formerly "ad hoc" process by which once-recognized tribes could secure federal recognition); *James v. United States Dep't of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) (involving once-recognized Gay Head Wapanoag and directing the group to the Part 83 procedures because "[t]he purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes"). Further, the Secretary's new interpretation of the 1867 Agreement sharply departs from her prior interpretations reaching back to the Secretary's 1867 transmittal of the Agreement to the President (*supra* 9) and her detailed 1897 legal opinion (*supra* 15). *See Watt v. Alaska*, 451 U.S. 259, 273 (1981), *discussed at* Pet. 6a.

[16] The agency's Final Decision does not mention *Weeks*. 10th Cir. APP 239-40. Similarly, the underlying legal opinion reached its conclusion strictly on "the weight of the administrative practice and analysis of the 1866 treaties and 1867 agreement," not on the basis of

nothing in *Weeks* even remotely hints that the Court there intended to undo a century of law, beginning with *Journeycake*, interpreting the 1867 Agreement as effecting a consolidation of the Delawares into the Cherokee Nation and thereby ending their separate sovereignty—indeed, the 1867 Agreement was not even at issue in *Weeks*. As the court of appeals correctly noted, "[t]he present case . . . turns on the [Secretary's] interpretation of the 1866 Cherokee Treaty and 1867 Agreement. We thus have a duty to follow *Journeycake* and *Delaware Indians* because they directly control our interpretation of the agreement." Pet. 24a.

Finally, at issue in *Weeks* was the constitutionality of a 1972 Act carrying out a claims award made under the ICCA in favor of an historic tribe, as a result of a suit brought by a modern "identifiable group of American Indians" (60 Stat. at 1050, § 2, *formerly codified at* 25 U.S.C. § 70a.[17] That 1972

Weeks. APP 266. This is perfectly understandable, given the Secretary in other litigation declared that *Weeks* did *not* overturn *Journeycake*, and did *not* constitute a recognition of the Delawares for anything other than the pursuit of ancient breach of pre-1867 treaty claims. APP 517-612.

[17] In reversing the Claims Commission's initial dismissal of the Delawares' claim (a decision which ultimately led to the judgment fund at issue in *Weeks*), the Court of Claims described the "Delawares who removed to the Cherokee territory" *not* as a tribe, but as merely having "maintained group identity" sufficient to prosecute a claim under section 2 of the ICCA. *Delaware Tribe of Indians v. United States*, 128 F. Supp. 391, 398 (Ct. Cl. 1955). Significantly, the 1972 Act providing for distribution of the Delaware judgment fund described the beneficiary as "the Delaware Tribe of Indians *in Docket 298*." 25 U.S.C. § 1291 (emphasis added). The "Delaware Tribe of Indians in Docket 298" was the same as the Delaware Tribe of Indians in Docket 27-A (*Absentee Delaware*, 21 Ind. Cl. Comm. at 345) which in turn was described by the Commission as being not a recognized tribe or band, but only as "members and citizens of the Cherokee Nation * * * who * * * maintained group identity." *Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm. 253, 260 (1952), *aff'd as to parties*, 128 F. Supp. 391, 398 (Ct. Cl. 1955) (same).

Act, like an earlier 1904 Delaware judgment fund statute discussed in *Weeks* (430 U.S. at 77 n.8, 86-87) made a distinction between (1) descendants of those Kansas Delawares who, under Article 3 of the Delaware 1866 Treaty, had voluntarily cut off all tribal relations of any nature whatsoever with any tribe and had chosen instead to become full U.S. citizens (and, in that legal sense only, non-Indians), and (2) descendants of those Oklahoma Delawares who under Article 4 remained "tribal" by incorporating into the Cherokee Nation or settling elsewhere in Oklahoma.

The Court's decision upholding the constitutionality of the 1972 Act was based entirely upon the 'non-Indian,' non-tribal legal status of the Kansas Delawares. As such, (1) they were not "an identifiable group of American Indians" (25 U.S.C. § 70a) empowered to pursue claims under the ICCA (430 U.S. at 85-86); (2) they had accordingly and historically been excluded from participation in earlier breach of treaty Delaware claims awards (*id.* at 86-87); and (3) due to that exclusion, Congress sought to avoid perceived "substantial problems it apprehended might attend a wider distribution" (*id.* at 87).

All to say that, contrary to petitioner's repeated insistence otherwise, nothing in the Court's ultimate conclusions turned on the unsupported introductory remark that the Delawares "are today a federally recognized tribe" (*id.* at 77). That point simply "was not relevant" to the issue presented, *infra* 24a, which required only that the Delawares be somehow tribally affiliated, *i.e.*, have legal "Indian" status. Indeed, lest one read more into the statement than is warranted, the Court noted immediately in footnote that Congress hitherto had treated the Delawares only as "a distinct entity," and that such action was in the claims setting, while also acknowledging that "[*t*]*he District Court made no finding as to the Cherokee Delawares' status as a recognized tribe.*" 430 U.S. at 77 n.8 (emphasis added). The only function of the Court's footnote

is to limit the statement in text to claims matters. Petitioner never explains what would have motivated the Court to make any broader and binding holding regarding the Delawares' recognized tribal status in the face of its irrelevancy and an empty record on the point. Of course, that is not what the Court did, and that is why the Tenth Circuit, like the D.C. Circuit, correctly reasoned that "[a]t most, *Weeks* stands for the proposition the Delawares reconstituted for claims purposes." Pet. 24a.[18] The absence of any genuine conflict between the Tenth and D.C. Circuits' opinions and *Weeks* further supports denial of the petition.

3. The claimed adverse impact upon petitioner's "members" does not provide a basis for review in this case. *Supra* 5. It is not just that the claim is premised on extra-record materials never before considered by the agency or by any court. *Id.* Nor is it just that the claim is plainly at odds with findings made elsewhere based upon the Delawares' own representations. *Id.* It is just plain wrong. Under the 1867 Agreement—

> all the members of the tribe, registered as above provided, *shall* become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other,) in the national funds, as *native* Cherokees, save as hereinbefore provided.

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[18] *See also* Pet. 23a ("The Court's dicta [in *Weeks*] . . . indicated Congress' distribution of a claims award to the "Delaware Tribe of Indians," was sufficient to recognize the Delawares as a tribe *for the limited purpose of the claims statute at issue in that case*") (citations omitted) (emphasis added); *infra* 24a (explaining, in part based upon the Secretary's acknowledgment at oral argument, APP 640, that "the Court simply summarized what it understood to be the government's position in that case"). Again, this is precisely how the Secretary viewed *Weeks* in subsequent years. *Supra* 15 n.11, 25 n.16. Such limited recognition of an Indian entity for claims purposes only is commonplace, with the Delawares a classic example. COHEN at 5-6 & n.20, 12 & n.64; 41 AM. JUR. 2D *Indians* § 6 nn.34 & 35 (2005); 42 C.J.S. *Indians* § 27 nn.91 & 92 (2005).

> And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

Pet. 95a (emphasis added). *See also* Cherokee Nation Const. art. III, § 1 (10th Cir. AR 7-1141) (defining Cherokee citizenship to include all Delaware descendants). Under these provisions the Delawares whom petitioner purports to represent are by law entitled to Cherokee citizenship, and to hold and retain such citizenship if they so choose. Requiring those people to remain Cherokee citizens if they wish to retain their tribal affiliation and associated services and protections hardly constitutes a "disastrous consequence[]" (Pet. 21) warranting review in this Court.[19]

4. The final basis urged for granting review is that two sentences in the court of appeals' decision regarding the importance of an agency following its own regulations, including the Secretary's regulations governing the recognition of Indian Tribes (25 C.F.R. pt. 83), somehow place into jeopardy the federal recognition of any number of other Indian Tribes that did not follow those regulations. But that is simply not so, for the court of appeals took care to note that it was striking down the Secretary's decision on this alternative ground only because "[t]he [Secretary] used *a procedure heretofore unknown to the law–'retract and declare'*–to purportedly re-recognize the Delawares." Pet.

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[19] To the extent the petitioner is referring to the more substantial and numerous contracts with the Secretary (and other agencies) that the petitioner secured after 1997 (discussed at the time petitioner sought a stay of the mandate), petitioner (like the Secretary) was on full notice as of the D.C. Circuit's July 1997 published decision that its newly-minted "recognition" was on thin ice. It is not the Tenth Circuit's ultimate ruling that is the source of any hardship, but the petitioner's decision after 1997 to enter into contracts for services (which petitioner's members were already eligible to receive from the Cherokee Nation), while its "tribal" status remained seriously in doubt in the courts. In all events, such consequences do not provide a basis for review in this Court.

25a (emphasis added). *See also infra* 17a (criticizing same). A ruling striking down such an extreme abuse of administrative process is plainly limited to its facts and context. In short, the court of appeals' decision is appropriately tailored to the conduct to which it is targeted.[20]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[20] Petitioner's argument that the Secretary has unbridled "power to correct errors" (Pet. 27) outside the framework of the Federally Recognized Indian Tribe List Act, Pub. L. 103-454, 108 Stat. 4791, *codified in part at* 25 U.S.C. §§ 479a and 479a-1, and its implementing regulations is plainly overbroad. Under that rubric, the Secretary, regardless of the actual circumstances, could declare her prior failure to recognize *any* group of Indians as a tribe to be an "error" and thus wholly circumvent the law. *Infra* 25 n.15.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5337

CHEROKEE NATION OF OKLAHOMA,
ON BEHALF OF ITS MEMBERS,
Appellant,

v.

BRUCE BABBITT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF INTERIOR OF THE UNITED STATES DEPARTMENT OF INTERIOR AND ADA E. DEER, IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF THE DEPARTMENT OF THE INTERIOR,
Appellees.

Appeal from the United States District Court
for the District of Columbia

July 15, 1997
As Amended on Grant of Rehearing Sept. 19, 1997.

Before: HENDERSON, ROGERS and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The Cherokee Nation of Oklahoma appeals from the dismissal, pursuant to Fed. R. Civ. P. 19(b), of its complaint challenging a Final Decision by the Department of the Interior extending formal recognition to the Delaware Tribe of Indians. It contends that the district court erred in ruling that the Delaware Tribe is a necessary and indispensable party that cannot be joined because it has sovereign immunity. The Cherokee Nation maintains that the

Delawares do not have sovereign immunity because they were "incorporated" into the Cherokee Nation pursuant to an 1866 treaty and a subsequent agreement between the two tribes. We hold that the district court erred in concluding that the Delawares can assert sovereign immunity in this lawsuit, and reverse.

I.

The history of the migration of the Delawares from what is now the northeastern part of the United States to the State of Oklahoma is set forth in *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 75-77 (1977). For our purposes, it suffices to observe that over time the Delawares were repeatedly forced westward and fragmented into separate groups. The main body of the tribe settled in Kansas under the terms of an 1829 treaty between the Delawares and the United States. Treaty of 1829, 7 Stat. 327; *Weeks*, 430 U.S. at 76. Although that Treaty contemplated the establishment of a "permanent residence" for the Delawares to be "forever secured" by the United States, the Delawares were soon forced to move again. In 1866, the Delawares entered into a new treaty under which their land in Kansas would be sold to a railroad company and the United States would find new land for them in the Indian Territory, which is now the State of Oklahoma. Treaty of 1866, 7 Stat. 793, 794; *Weeks*, 430 U.S. at 77. This Treaty of 1866 also permitted any Delawares who wished to remain in Kansas to sever their relations with the tribe and become citizens of the United States.[1] 7 Stat. 794. It is the legal status of the Delawares who moved to

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[1] Congress passed several statutes naturalizing particular classes of Indians beginning in the 1870s. *See, e.g.*, General Allotment Act of 1887 ("Dawes Act"), § 6, ch. 119, 24 Stat. 388, 390, *codified as amended at* 25 U.S.C. § 349. However, Congress did not extend citizenship to all native-born Indians until 1924. *See* 8 U.S.C. § 1401(b); *see generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 639-42 (1982).

Oklahoma pursuant to the 1866 treaty (and their descendants) that is at issue in this litigation.

Shortly after the Treaty of 1866 with the Delawares was concluded, the United States entered into a Treaty with the Cherokee Nation, which resided in the Indian Territory.[2] Treaty of 1866, 14 Stat. 799 (1866). Article 15 of this second Treaty of 1866 provided that:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: [*FIRST:*] Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. [*SECOND:*] And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they

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[2] Like the Delawares, the "Five Civilized Tribes" (the Cherokee, Chickasaw, Choctaw, Creek, and Seminole) are not native to Oklahoma. The Five Civilized Tribes originated in what is now the southeastern portion of the United States, but were forced westward and settled in Oklahoma in the 1830s. *See generally* MURIEL H. WRIGHT, A GUIDE TO THE INDIAN TRIBES OF OKLAHOMA 4, 58-65 (9th prtg. 1986).

> should so decide, for each man, woman, and child of said tribe, and shall pay [1] for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.
>
> And the said tribe thus settled shall also pay [2] into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund . . . than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. . . .

Id. at 803-804.

In 1867, the Delawares entered into an Agreement with the Cherokee Nation. Under that Agreement the Cherokee Nation agreed to "sell to the Delawares, for their occupancy, a quantity of land . . . in the aggregate equal to 160 acres for each individual of the Delaware tribe" who moved to Oklahoma. The Delawares, in turn, agreed to pay the Cherokee Nation $1 per acre for this land, and "a sum of money which shall sustain the same proportion to the existing Cherokee national fund that the number of Delawares . . . removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee Nation." In addition, the Cherokee Nation and the Delawares agreed that:

> On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered, as above provided, shall become members of the Cherokee Nation with the same rights and immunities, and the same participation (and no other) in the national funds, as native Cherokees save as hereinbefore provided.
>
> And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees.

Pursuant to the two Treaties of 1866 and the 1867 Agreement, most of the Delawares moved to Cherokee territory "where they were gradually assimilated for most purposes into the Cherokee Nation. . . ." *Weeks*, 430 U.S. at 77.[3]

Although the 1867 Agreement provided that the Delawares would be "incorporated into the Cherokee Nation" and enjoy "the same rights and immunities . . . as native Cherokees," conflicts developed between the two groups. In 1890, the Delawares sued the Cherokee Nation for a share of the proceeds from the rental of certain Cherokee land. In *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), the Supreme Court reviewed the 1867 Agreement and Article 15 of the 1866 Treaty with the Cherokee Nation, concluding that the Delawares had "become incorporated into the Cherokee Nation and are members and citizens thereof," and that it "follow[ed] necessarily that they are, equally with the native Cherokees, the owners of, and entitled to share in the profits and proceeds of, [Cherokee] lands." *Id.* at 211. The Court did not expressly rule on whether the Delawares had settled in Cherokee territory under the first or the second provision of Article 15, but it did state that the 1867 Agreement made "no provision for the setting apart of a distinct body of land in any portion of the reservation for the Delaware Tribe. . . ." *Id.* at 205. In 1904, the Delawares again sued the Cherokee Nation, pursuant to a special Act of Congress,[4] seeking a declaration of their rights in the land they acquired under the 1867 Agreement. In *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), the Supreme Court held that the Delawares did not acquire any permanent interest in these lands that

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[3] The Delawares who moved to Cherokee territory, whom we refer to as "Delawares" are sometimes referred to as the "Cherokee Delawares," *see Weeks*, 430 U.S. at 77, or the "Registered Delawares," *see Delaware Indians v. Cherokee Nation*, 193 U.S. 127, 143 (1904).

[4] Act of June 28, 1898, § 25, 30 Stat. 495.

could be passed on to their descendants, but only the right to use and occupy these lands during their lifetimes; any children of the Delawares born after the move to Oklahoma "took only the rights of other citizens of the Cherokee Nation, as the same are regulated by its laws." *Id.* at 143.

Notwithstanding the 1867 Agreement and the Supreme Court decisions, the Delawares continued to maintain a distinct group identity separate from the Cherokee Nation. *See Weeks*, 430 U.S. at 77. In 1940, the Department of the Interior acknowledged that the Delawares were entitled to organize as a tribe under the Oklahoma Indian Welfare Act, concluding that "although for certain administrative purposes, the Cherokee Nation in which the Delawares . . . and others were amalgamated was recognized as of [sic] a single tribe, the national or tribal character of the Delaware-Cherokees was never lost or completely merged into that of the Cherokees."[5] In 1958 the Department convened a general meeting at which the Delawares elected a business committee and adopted formal bylaws, which the Department approved in 1962. Yet, according to an affidavit filed by the Cherokee Nation, the Delawares also continued to participate in the Cherokee government, voting in Cherokee elections and holding office on the Council of the Cherokee Nation.

On at least two occasions, Congress has recognized the Delawares as a distinct tribal entity, separate from the Cherokee Nation, for the purpose of distributing funds to compensate the tribe for injuries suffered prior to 1867. In 1904, Congress appropriated $150,000 to "the Delaware Tribe of Indians residing in the Cherokee Nation, as said tribe in council shall direct" as full payment of "all claims and demands of said tribe against the United States." Act of April 21, 1904, § 21, 33 Stat. 189, 222. In 1972, Congress enacted

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[5] For ease of reference, we refer hereinafter to the Department of Interior, and any official or subdivision including the Bureau of Indian Affairs, as "the Department."

a formula for the distribution of approximately $9 million awarded by the Indian Claims Commission to the Delaware tribe for the United States' breach of an 1854 treaty. 25 U.S.C. §§ 1291-97. Under the statutory formula, the only Delawares eligible to share in the award were the "Cherokee Delawares," the descendants of those Delawares who had moved to Cherokee territory in 1867, and the "Absentee Delawares," a separate band of Delawares recognized by the Department as a distinct tribe.[6] *Id.* § 1292. In *Weeks*, the Kansas Delawares, descendants of those Delawares who remained in Kansas in 1867, challenged their exclusion under the statutory formula on the grounds that it denied them equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment. 430 U.S. at 75. The Supreme Court rejected this argument, holding that Congress had a rational basis for the exclusion because the Kansas Delawares were not a recognized tribal entity and had previously severed their ties to the tribe, Congress had previously distinguished between the Kansas Delawares and the Cherokee-Delawares in the 1904 statute, and Congress was concerned with the administrative difficulty of including the Kansas Delawares. *Id.* at 85-89. In reviewing the history of the Delawares, the Court observed that the Cherokee-Delawares "are today [in 1977] a federally recognized tribe." *Id.* at 77.

In 1979, the Department repudiated the position, noted in *Weeks*, that the Delawares were an independent tribe, and advised that henceforth the Department would not maintain any government-to-government relationship with the Delawares. By letter of May 24, 1979, the Department stated that:

> 1. Based on the 1867 Agreement and related statutes, the Cherokee Delawares are a tribe within the Cherokee Nation. They are Cherokee citizens with the same

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[6] The formal name of the "Absentee Delawares" is the Delaware Tribe of Western Oklahoma.

responsibilities and privileges as other citizens of the Cherokee Nation.

2. The Cherokee Delawares may deal with their judgment awards and preserve their Delaware heritage and identity. For *governmental* purposes, however, they must look to the Cherokee Nation, of which they are an integral part.

Thus, from 1979 until the Final Decision of September 27, 1996, the Department declined to recognize the Delawares as a separate tribe.

In 1992, the Delawares advised the Department of their intent to petition for recognition as an Indian tribe pursuant to 25 C.F.R. Part 83, which sets forth "departmental procedures and policies for acknowledging that certain American Indian groups exist as tribes." 25 C.F.R. § 83.2 (1996); *see also id.* §§ 83.4, 83.6. In 1994, the Department responded that it would not consider such a petition because Congress had already defined the relationship between the Delawares and the Cherokee Nation. Based on the language of the 1867 Agreement, the relevant treaties, and the Supreme Court's decisions in *Journeycake* and *Delaware Indians,* the Department stated, "[i]t is the position of the Department of the Interior that the Cherokee Delawares have not existed as an independent political entity since 1867, and have been absorbed into the Cherokee Nation of Oklahoma for general governmental purposes since that time."

The Delawares requested reconsideration and retraction of the 1979 letter, and after reviewing its relationships with the Delawares since 1867, the Department published a Notice of Intent to retract the 1979 letter. 61 Fed. Reg. 33,534, 33,534-35 (1996). Following comment by the Delawares and the Cherokee Nation, the Department issued a Final Decision on September 27, 1996, retracting the 1979 letter and recognizing the Delawares as a "separate sovereign" with "the

same legal rights and responsibilities as other tribes, consistent with federal law, both as to jurisdiction and as to its right to define its membership." 61 Fed. Reg. 50,862, 50,863 (1996). Thereafter, the Department included the Delawares on the list of federally recognized tribes published in the *Federal Register*. 61 Fed. Reg. 58,212 (1996).

The Cherokee Nation filed the instant lawsuit, seeking review of the Final Decision under the Administrative Procedure Act. 5 U.S.C. §§ 551-99 (1996). The complaint alleged that the Final Decision was arbitrary and capricious because the Department failed to follow the Part 83 regulations governing tribal recognition, and was contrary to applicable law, including the Treaty of 1866 with the Cherokee Nation, the 1867 Agreement between the Cherokee Nation and the Delawares, and the Supreme Court's decisions in *Journeycake* and *Delaware Indians*.[7] The named defendants, the Secretary of the Interior and the Assistant Secretary for Indian Affairs, moved to dismiss the complaint pursuant to Fed. R. Civ. P. 19(b) for failure to join an indispensable party, the Delaware Tribe. The district court granted the motion, ruling that the Delawares had sovereign immunity and that they were a necessary and indispensable party. Although the district court concluded, based on *Journeycake* and *Delaware Indians*, that the Delawares had settled in Cherokee territory pursuant to the first provision of Article 15 of the 1866 Treaty with the Cherokee Nation, the court rejected the argument that the 1867 Agreement waived the Delawares' sovereign immunity. Interpreting the Supreme Court in *Weeks* to have "found" that the Delawares were a

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[7] The complaint also alleged that the Final Decision diminished the privileges and immunities of the Cherokee Nation in violation of 25 U.S.C. § 1212(4); violated the Interior and Related Agencies Appropriation Act of 1992, Pub. L. 102-154, 105 Stat. 990 (1991); impaired the Cherokee Constitution; and violated the United States' fiduciary and trust obligations to protect Cherokee sovereignty and tribal property.

distinct Indian tribe, the district court further concluded that the Delawares are still a "tribe" that, in the absence of an express waiver, was entitled to assert sovereign immunity. The Cherokee Nation appeals the dismissal of the complaint; the Delawares appear as amicus curiae in support of the Department.

II.

Rule 19 of the Federal Rules of Civil Procedure establishes a two-step procedure for determining whether an action must be dismissed because of the absence of a party needed for a just adjudication.[8] First, the court must determine whether

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[8] Fed. R. Civ. P. 19 provides, in relevant part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. . . .
>
> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

the absent party is "necessary" to the litigation according to factors enumerated in Rule 19(a); if so, the court must order that the absent party be joined. If a necessary party cannot be joined, the court must turn to the second step, examining the factors in Rule 19(b) to "determine whether in equity and good conscience, the action should proceed among the parties before it, or should be dismissed, the absent person being regarded as indispensable." Fed. R. Civ. P. 19(b). The district court concluded that the Delawares were a necessary party, that they had sovereign immunity and could not be joined, and that the lawsuit could not proceed in their absence.[9] The Cherokee Nation contends that the Delawares cannot assert sovereign immunity in this lawsuit, that the Delawares are not indispensable because the Department can adequately repre-

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[9] The Department suggests that the Cherokee Nation lacks prudential standing to challenge the department's failure to apply the Part 83 regulations on tribal recognition because it does not fall within the "zone of interests" protected by the regulations. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). The regulations define an "interested party" as:

> any person, organization or other entity who can establish a legal, factual, or other property interest in an acknowledgment determination and who requests an opportunity to submit comments or evidence or to be kept informed of general actions regarding a specific petitioner. "Interested party" . . . may include, but is not limited to . . . any recognized Indian tribes and unrecognized Indian groups that might be affected by an acknowledgment determination.

25 C.F.R. § 83.1 (1996). The Cherokee Nation has Article III standing because the Final Decision affects the authority of the Cherokee Nation over the Delawares and may affect its eligibility for certain federal funds. Thus, the Cherokee Nation has suffered an injury-in-fact that is fairly traceable to the Department's action and that can be redressed by an order invalidating the Final Decision. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Because the Cherokee Nation is also an "interested party" within the meaning of the Part 83 regulations, it has prudential standing, at least as to its claim that the Department acted contrary to law by failing to follow the regulations.

sent their interest in defending the Final Decision, and that, in any event, the public interest exception to Rule 19 applies.

Whether a group constitutes a "tribe" is a matter that is ordinarily committed to the discretion of Congress and the Executive Branch, and courts will defer to their judgment. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *James v. United States Dept. of Health and Human Serv.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987). Although the principle of deference does not require a court to avoid the question of sovereignty, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). For reasons consistent with our recognition in *James* that the expertise on tribal recognition resides elsewhere, 824 F.2d at 1138, we examine first whether other grounds exist to resolve the instant appeal, without reaching the question of whether the Delawares are a tribe with an identity and sovereignty separate from that of the Cherokee Nation. Treating the Cherokee Nation's contentions in reverse order, we conclude first that Rule 19 cannot itself be avoided by applying the public interest exception, described in *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1500 (D.C. Cir. 1995). The issues presented, although of considerable importance to the Delawares and the Cherokee Nation, and to a lesser extent to the Department, do not require the joinder of a large number of persons whom it is infeasible to join in the lawsuit. The particular issues do not involve a matter of the type of "transcending importance" for which the exception has previously been invoked. *Id.* (citations omitted). Essentially, the dispute involves rights to federal benefits, or, more expansively, the relationship between two groups and their respective relationships with the federal government. While issues of sovereignty are fundamental in nature, as narrowly posed here between two

groups, there is simply no necessity requiring invocation of an exception to Rule 19.

Turning to the first step in the Rule 19 analysis, we conclude that the Department cannot adequately represent the Delawares. Although the Ninth Circuit has held that "[i]n disputes involving intertribal conflicts, the United States cannot properly represent any of the tribes without compromising its trust obligation to all tribes," *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994); *see also Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990), this court has looked to whether there are additional indications that the United States' interests might diverge from those of the absent tribe or tribes. In *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986), the court concluded that the United States could not adequately represent two absent tribes where there was a potential conflict between the tribes and the United States was "apparently willing to concede a large portion of [one tribe's] claim for retroactive relief." *Id.* at 775 & n.11. Here, although the Delawares and the Department currently take the same position regarding the Delawares' sovereignty, and to that extent their interests are the same, the Department has twice reversed its position regarding the Delawares since 1940. Given the procedure used to reach the Final Decision at issue, the Department may reverse itself again. Moreover, even were the Department vigorously to represent the Delawares vis-a-vis the Cherokee Nation in the district court, the Department might decide not to appeal any unfavorable decision. As a non-party, the Delawares would have no right to appeal, regardless of whether the Department's decision was based on its view of the merits or on other considerations. *Id.* at 775. The Delawares' ability to participate as an amicus curiae is thus insufficient to protect their interests. *Id.*

The Cherokee Nation's reliance on *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), is misplaced inasmuch as there was nothing in that case to indicate that the United States would to any degree abandon the position of the absent tribes as a group in favor of the position taken by the tribes before the court on the other side of the lawsuit. *Cf. Wichita and Affiliated Tribes*, 788 F.2d at 775 & n.11. In *Ramah,* the absent Indian tribes were not necessary parties to a lawsuit challenging the Department's allocation of certain funds not only because they had no legally protected interest in the funds, 87 F.3d at 1351, but also because even if they had such an interest, the Department had no authority to give one of the absent tribes a greater share of the funds than another, *id.* at 1352, and thus had no conflicting obligations to the nonparty tribes. Absent such a convergence of interests between the Department and an absent tribe, particularly where the absent tribe's sovereignty is challenged, we find no abuse of discretion by the district court in concluding that the Delawares are indispensable.

Consequently, the question is whether the district court erred in concluding that the Delawares are entitled to assert sovereign immunity. This is a question of law that the court reviews de novo. *See Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1169 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995). It is well established that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo*, 436 U.S. at 55 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 232 (1982). As sovereign entities that predate the establishment of the United States, they are immune from suit without their consent. *Santa Clara Pueblo*, 436 U.S. at 58; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991). Tribal sovereign immunity does not derive from an act of Congress, but rather is one of

the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (citation omitted); *see also Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1065 (1st Cir. 1979). Unlike the sovereignty possessed by states and foreign nations, however, the sovereignty of Indian tribes is subject to the control of Congress, which has plenary authority to limit, modify, or eliminate tribal sovereign immunity. *Santa Clara Pueblo,* 436 U.S. at 58; *see generally* U.S. Const., art. I, § 8, cl. 3. Any waiver of a tribe's sovereign immunity, whether by Congress or by the tribe itself, "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (citations omitted); *Wichita and Affiliated Tribes*, 788 F.2d at 773.

Not all groups, however, are "tribes" that are entitled to claim sovereign immunity or exercise the other prerogatives of sovereign powers. As noted, this is generally a matter for the other two branches of government to determine. *Holliday,* 70 U.S. (3 Wall.) at 419; *James*, 824 F.2d at 1137. Whatever difficulty courts may have encountered in determining whether Congress or the Executive Branch has recognized a group as a tribe was substantially reduced in 1978 when the Department promulgated procedures governing federal recognition of Indian tribes. *See* 25 C.F.R. Part 83 (1996). The Part 83 regulations provide that:

> Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes. Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.

Id. § 83.2. Pursuant to these regulations, the Department periodically publishes in the *Federal Register* a list of all federally acknowledged tribes. *Id.* § 83.5(a).[10]

This court considered the effect of the Part 83 regulations in *James*. In that case, a group of Indians sued the Department, seeking an order that they be placed on the list of federally recognized tribes. 824 F.2d at 1135. A rival group of members from the same tribe had previously received federal recognition under the Part 83 regulations. *Id.* at 1136. The unrecognized group contended that it was not required to use the procedures under the Part 83 regulations because the federal government had previously recognized the tribe by including it in certain nineteenth-century lists. The court rejected this argument, holding that "[t]he purpose of the regulatory scheme . . . would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist." *Id.* at 1137. Noting that the Department's special expertise in the area of tribal recognition "weighs in favor of giving deference to the agency," *id.* at 1138, the court held that it would require the unrecognized group to exhaust its administrative remedies. *Id.* at 1139.

Consistent with *James*, the inclusion of a group of Indians on the *Federal Register* list of recognized tribes would ordinarily suffice to establish that the group is a sovereign power entitled to immunity from suit. *Cf. Holliday*, 70 U.S. (3 Wall.) at 419. However, because the Delawares have been included on the most recent list as a result of the Final Decision now challenged by the Cherokee Nation, we con-

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[10] Although Part 83 regulations require that the list be published no less frequently than every three years, 25 C.F.R. § 83.5(a) (1996), the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a-1 (1994), requires the list to be published annually.

clude for several reasons that the Department's determination cannot be dispositive of the sovereign immunity issue in the instant appeal.

First, the Department did not follow the Part 83 regulations, but recognized the Delawares through the procedural device of retracting the May 24, 1979, non-recognition letter. An agency is required to follow its own regulations. *Service v. Dulles,* 354 U.S. 363, 388 (1957); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). *See Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) (citing *Edwards, McCoy & Kennedy v. Acting Phoenix Area Director*, 18 I.B.I.A. 454, 457 (1990)). The notice and comment procedures used by the Department to retract the 1979 letter are not the same as Part 83 procedures, which, among other things, allow reconsideration by the Interior Board of Indian Appeals. 25 C.F.R. § 83.11 (1996). Nothing in the record reveals a finding by the Department pursuant to 25 C.F.R. § 1.2 (1996), whereby the regulations were waived "in the best interest of the Indians." Because the Delawares gave only notice of an intent to file a petition, moreover, use of Part 83 is not barred under 25 C.F.R. § 83.10(p) (1996), which precludes repetitioning after a denial of recognition.[11] *See also* 25 C.F.R. § 83.3(f) (1996).

Second, even assuming that the Part 83 regulations are not the exclusive means by which the Department may recognize tribes, the Final Decision on which the recent listing of the Delawares is based cannot itself be used to block review. The Cherokee Nation's complaint alleges that recognition of the Delawares is contrary to federal law, namely Article 15 of the Treaty of 1866 with the Cherokee Nation and the Supreme Court's decisions in *Journeycake* and *Cherokee Nation.* If

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[11] By letter of August 5, 1994, the Department, after responding to the Delawares' notice of intent to file a petition for recognition under Part 83, advised the Delawares, that they could file a "documented petition."

the Department acted contrary to law, the Final Decision would be owed no deference. Finally, were the court to decline to review the district court's sovereign immunity ruling, then the Department's recognition decisions would be unreviewable, contrary to the presumption in favor of judicial review of agency action. *See, e.g., Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). While this presumption must sometimes give way where tribal sovereign immunity is at issue because "society has consciously opted to shield Indian tribes from suit without congressional or tribal consent," *Wichita and Affiliated Tribes*, 788 F.2d at 777; *see also Kickapoo Tribe*, 43 F.3d at 1499, that shield is available only when a group of Indians has been recognized as a sovereign by Congress, the Executive Branch, or the courts, and it is thus inappropriately invoked when tribal sovereignty is the ultimate issue. *Cf. Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992).

Because reliance cannot be placed on the Department's recognition of the Delawares pursuant to the Final Decision, the court must itself decide whether the Delawares constitute a sovereign tribe. The Supreme Court has defined a "tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ." *Montoya v. United States*, 180 U.S. 261, 266 (1901). The parties do not appear to dispute that prior to 1867 the Delawares were a tribe by this definition, or that they were recognized as such by the United States.[12] The question is

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[12] That the present-day Delawares are a "tribe" in the sense of being a distinct ethnic group sharing a common language, culture, and institutions, is not necessarily controlling because "Congress and the Executive have often departed from ethnological principles to determine tribes with which the United States would carry on political relations." COHEN, *supra*, at 5-6.

whether the 1867 Agreement effectively consolidated the Delawares into the Cherokee Nation and thereby ended their existence as a separate entity with respect to the Cherokee Nation. In answering this question, the court is bound by the Supreme Court's interpretation of that Agreement in *Journeycake* and *Delaware Indians*.

In *Journeycake*, the Supreme Court viewed a proper understanding of the 1867 Agreement to require reference to Article 15 of the Treaty of 1866 with the Cherokee Nation. 155 U.S. at 204. As described by the Court, Article 15:

> contemplated the settlement of other Indians within the limits of the Cherokee country east of the ninety-sixth degree of longitude, and provided for such settlement in two ways: One, in which the Indians settled should abandon their tribal organization, in which case, as expressed, they were to be "incorporated into, and ever after remain a part of, the Cherokee Nation on equal terms in every respect with native citizens." The other was where removal of the tribe to the Cherokee country should involve no abandonment of the tribal organization, in which case a distinct territory was to be set off, by metes and bounds, to the tribe removed. The one contemplated an absorption of individual Indians into the Cherokee Nation; the other a mere location of a tribe within the limits of the Cherokee reservation. If the removed Indians were to be absorbed into the Cherokee Nation, they were to be absorbed on equal terms in every respect with other citizens.

Id. at 204-05. Neither *Journeycake* nor *Delaware Indians* explicitly addressed whether the Delawares settled in Cherokee territory pursuant to the first or the second provision of Article 15. The district court, however, relying on those cases, concluded that the Delawares settled in Cherokee territory pursuant to the first provision.

On its face, the language of the 1867 Agreement provides no clear indication as to which of the two Article 15 provisions applies. On the one hand, as noted in *Journeycake*, 155 U.S. at 205, the 1867 Agreement did not require the Cherokees to set aside a distinct "district of country" for the Delawares to occupy. Instead, the Agreement referred to a "quantity of land . . . *in the aggregate* equal to 160 acres for each member of the Delaware tribe . . . ." (emphasis added). Furthermore, the last two clauses of the 1867 Agreement provided that the Delawares would "become members of the Cherokee nation" and that the "children hereafter born of such Delawares so incorporated" would "be regarded as native Cherokees." Both considerations suggest that the Agreement was governed by the first provision of Article 15, whereby the settling tribe would lose its separate identity and be incorporated into the Cherokee Nation. On the other hand, as both the Delawares and the Department note, the Agreement also required the Delawares to make two payments to the Cherokees: one based on their population and a second for their land. This suggests that the parties intended the Agreement to be governed by the second provision of Article 15, whereby the settling tribe would maintain its separate identity.

Although the evidence of the Delawares' two payments is consistent with the second provision of Article 15, it turns out that there is reason to think that the two payments are not necessarily inconsistent with the first provision of Article 15. Simply put, the Delawares may have intended to give up their separate tribal existence, as required by the first provision, but negotiated a side agreement to ensure that they would have the same rights of occupancy in Cherokee land as native Cherokees. At the time, Cherokee land was not held by individual tribal members, but by the tribe as a whole. *Journeycake*, 155 U.S. at 207. Cherokee law, however, permitted individual Cherokee to use certain lands for their personal occupation. *Id.* at 212. Thus, the Delawares' second

payment may have purchased a guarantee that they would receive an equal entitlement to the use of Cherokee land during their lifetimes, and not a right to maintain a separate existence as a tribe. The Supreme Court's language in *Journeycake* suggests that it viewed the second payment in this manner:

> So far as the provision in the [A]greement for the purchase of homes is concerned, it will be perceived that no absolute title to these homes was granted. We may take notice of the fact that the Cherokees, in their long occupation of this reservation, had generally secured homes for themselves; that the laws of the Cherokee Nation provided for the appropriation by the several Cherokees of lands for personal occupation, and that this purchase by the Delawares was with the view of securing to the individual Delawares the like homes; that the lands thus purchased and paid for still remained a part of the Cherokee Reservation. And, as a further consideration for the payment of this sum for the purchase of homes, the Delawares were guaranteed not merely the continued occupancy thereof, but also that, in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they should receive an aggregate amount equal to that which they had purchased, and such a distribution as would secure to them the homes upon which they had settled, together with their improvements. . . .

155 U.S. at 212-213; *see also Delaware Indians*, 193 U.S. at 139. That the Delawares received only a lifetime entitlement to use and occupy the lands acquired under the 1867 Agreement, *id.* at 143, also suggests that the second payment was not intended to guarantee a separate tribal existence. Hence, the fact of the second payment may be a doubtful basis from which to infer that the parties intended to be governed by the second provision of Article 15.

What is clear from the face of the 1867 Agreement and from *Journeycake* and *Delaware Indians*, however, is that the parties intended that the Delawares would be "incorporated" into the Cherokee Nation, and that their descendants would be regarded as Cherokee citizens. The ordinary meaning of "incorporate" is "to unite with . . . something already existent . . . so as to form an indistinguishable whole that cannot be restored to the previously separate elements. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1145 (1981). Although nothing in the Agreement prevented the Delawares from maintaining a separate cultural identity, "incorporation" is incompatible with the notion that they were to retain a separate governmental identity from the Cherokee Nation. The use of the term "incorporated" in the 1867 Agreement is sufficiently unambiguous to constitute an express relinquishment of the Delawares' status as a separate sovereign.

The alternative interpretations of the 1867 Agreement offered by the Delawares are unpersuasive. First, the Delawares note that the preamble to the 1867 Agreement refers to "a location of the Delawares upon the Cherokee lands, and their consolidation with the Cherokee Nation." They contend that the word "consolidation" suggests an alliance between two tribes, rather than the abandonment of one tribe's existence by incorporating into the other. In ordinary usage, however, "consolidate" means "to join together (as two or more items into one unit, or whole)." WEBSTER'S THIRD, *supra*, at 484. It is, therefore, quite similar in meaning to "incorporate." Second, the Delawares contend that the grant of Cherokee citizenship to the Delawares and their children is not inconsistent with the maintenance of a separate tribal existence. They maintain that these provisions were merely intended to prevent the Cherokees from discriminating against the Delawares. As the facts in *Journeycake* demonstrate, the Delawares may have had reason to fear that the Cherokee might not treat them as equal members of their society. But the Delawares point to nothing in the 1867

Agreement to suggest that the "incorporation" language was intended solely as an anti-discrimination clause. The Agreement contains no such language, but instead provides that the children of the Delawares "shall in all respects be regarded as native Cherokees." The plain meaning of this language is that the two tribes were to be consolidated into a single unit.

The fact that a tribe's sovereign immunity continues even after it has dissolved or abandoned its tribal government, *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940), is, for our purposes, beside the point. The question of whether the district court erred does not turn on the abandonment of tribal institutions. As the Department notes, it does not appear that the Delawares ever abandoned their tribal institutions as a matter of practice. But the 1867 Agreement called for incorporation of one tribe into another. This represents a more radical disavowal of tribal identity than mere dissolution of governmental institutions, as was discussed in *Fidelity*. The parties have cited no authority to suggest that a sovereign tribe cannot, pursuant to authorization by Congress, relinquish its sovereignty and merge with another tribe, and it would be anomalous to hold that the two tribes each retained a separate governmental existence after such a merger.

Nor can we conclude that Congress' treatment of the Delawares after 1867 constituted recognition of the tribe as a distinct sovereign entity. Congress has recognized the Delawares as a distinct people on at least two occasions, in 1904 and 1972, for the purposes of distributing funds to redress the tribe for pre-1867 claims against the United States. Recognition of a tribe for the purpose of redressing historical claims, however, does not necessarily imply recognition of that tribe as separate political entity for other purposes. Congress has permitted any "identifiable group" to assert claims against the United States regardless of whether

such a group constitutes a "tribe" or "band."[13] 28 U.S.C. § 1505; *see* Indian Claims Commission Act, Pub. L. 70-726, § 2, 60 Stat. 1049, 1050 (1946); *see also Menominee Tribe of Indians v. United States*, 388 F.2d 998, 1001 (Ct.Cl. 1967), *aff'd*, 391 U.S. 404 (1968); COHEN, *supra*, at 12.

In concluding that the Delawares did retain sovereign immunity, the district court relied on the Supreme Court's statement in *Weeks* that the Delawares "are today a federally recognized tribe." 430 U.S. at 77. Yet *Weeks* cannot be so broadly read as to resolve the issue in the instant appeal. Nothing in the Court's opinion suggests that it was revisiting its earlier conclusion in *Delaware Indians* and *Journeycake* that the Delawares had been "incorporated" into the Cherokee Nation. Rather, the Court simply summarized what it understood to be the government's position in that case. Nor does the holding in *Weeks* require the conclusion that the Supreme Court has recognized the Delawares as a sovereign tribe. *Weeks* was an equal protection case, addressing pre-1867 claims, in which the issue was whether Congress had a rational basis for excluding the Kansas Delawares from a distribution formula. *Id.* at 82, 85. So long as the government could articulate some reasoned explanation for the exclusion, the Court was required to uphold it. *See Heller v. Doe*, 509 U.S. 312, 319 (1993); *see also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The Court concluded that the exclusion was reasonable, based on historical practice, administrative convenience, and the fact that the Kansas Delawares chose to sever their relations with the tribe. Because it was not relevant, the Court did not address whether the Cherokee Delawares retained their separate existence as a sovereign tribe after 1867.

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[13] By contrast, Congress has only permitted an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" to assert federal jurisdiction under 28 U.S.C. § 1362.

Even were the court to conclude that the Delawares settled in Cherokee territory pursuant to the second provision of Article 15 of the 1866 Treaty with the Cherokee Nation and retained their separate existence as a tribe, it would still be doubtful whether the Delawares could assert sovereign immunity against the Cherokee Nation. The second provision of Article 15 permitted a settling tribe to retain its "tribal laws, customs, and usages" only insofar as they were "not inconsistent with the constitution and laws of the Cherokee Nation." Thus, the Cherokee Nation was to retain "general jurisdiction . . . over the territory occupied by the removed tribe." *Journeycake*, 155 U.S. at 205. The Supreme Court distinguished this arrangement from Article 16, 14 Stat. 804, which provided for the settlement of tribes in Cherokee country west of 96° of longitude and the termination of Cherokee Nation jurisdiction.[14] *Journeycake*, 155 U.S. at 205. The Department suggests that the relationship between the Cherokee Nation and the Delawares is analogous to the relationship between the United States and the individual States, which retain their sovereign status even though they are part of a greater whole. The Cherokee Nation responds that just as a State cannot assert sovereign immunity against the United States, *United States v. Mississippi*, 380 U.S. 128, 140 (1965), the Delawares cannot assert sovereign immunity against the Cherokee Nation, of which they are a part. Whatever the merits of this argument, the principles govern-

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[14] Article 16 of the 1866 Treaty with the Cherokee Nation:

> provided for taking a body of land out of this part of the Cherokee Reservation and removing it wholly from the jurisdiction of the Cherokee Nation, making a new reservation for the occupancy of the tribe to which it was conveyed; while in the case of Indians removed under the provisions of article 15, even though the tribal organization was preserved, the general jurisdiction of the Cherokee Nation over the territory occupied by the removed tribe was not disturbed.

Journeycake, 155 U.S. at 205.

ing the relationship between the federal government and the States do not automatically translate to other contexts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 571-77 (1964). In any event, the fact that the Delawares are part of the Cherokee Nation supports the conclusion that they cannot, at the very least, assert sovereign immunity in a lawsuit brought by the Cherokee Nation. A contrary interpretation would render the Cherokee "jurisdiction" over the Delawares illusory.

For these reasons, underscoring the doubts about the sovereign status of the Delawares in the face of agreement to incorporate the two tribes, we conclude that by entering into the 1867 Agreement the Delaware Tribe of Indians relinquished its tribal identity or sovereignty in relation to the Cherokee Nation.[15] It is true that Congress has the authority to restore to the Delawares the separate sovereignty that the 1867 Agreement eliminated, and may delegate that authority to the Executive Branch. Federal policy has shifted over time,[16] and changes in the past 130 years might justify federal recognition of the Delawares, either by means of the Final Decision, the Part 83 regulations, or another method. It remains for the district court to determine the Cherokee Nation's challenge under the Administrative Procedure Act to the Final Decision of September 27, 1996, including whether the Delawares' tribal identity was properly revived by the Department in its Final Decision. Accordingly, we reverse the order dismissing the complaint and remand the case to the district court.

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[15] Our holding, of course, is limited to deciding whether the district court erred in its Rule 19 ruling. We leave for initial decision by the district court the proper interpretation of the 1867 agreement with the Delaware Tribes as a party to the proceedings and in light of the full administrative record, which is not before this court.

[16] *See generally* Reid Payton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

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IN THE

Supreme Court of the United States

DELAWARE TRIBE OF INDIANS,

Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
GALE NORTON, Secretary of the Interior, and
JAMES E. CASON, acting as Assistant Secretary –
Indian Affairs,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY

It is clear from the briefs in opposition that the issues on the merits will be squarely joined, with the Cherokee Nation asserting one side of them, and the Delaware Tribe and the Secretary of the Interior asserting the other. While there is more to say concerning why the Delaware Tribe and the Secretary are correct on the merits and the Cherokee Nation is wrong, the question at this point is whether a writ of certiorari should be granted to resolve those merits.[1] That question turns, in sum, on whether it is "important" that review be granted. On that, the parties are not in agreement, but the answer is nonetheless clear.

I. The Questions Presented Are Important, and There is a Compelling Need for Review Now.

The Cherokee Nation argues that there is no important or compelling need for this Court's review, but that is not true. As established in the Petition, this case involves an unprecedented decision by a federal appellate court to void direct relations between the Executive branch and the chosen tribal government of over 7,000 Native Americans. That decision is based on the court of appeals' erroneous ruling that two of this Court's decisions from 100 years ago command that result, despite more recent Congressional acts,

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[1] It may be noted now, however, that, reduced to its essence, the entirety of the Cherokee Nation's argument is that, because in the 1867 Agreement the Delaware Tribe of Indians agreed to provisions for individual Delawares to have the rights of native Cherokees, the Delaware Tribe necessarily also abandoned its own identity as a distinct tribal organization. That is not so, as outlined in the Petition, *e.g.*, Pet. at 16-17, as recognized by the Department, *e.g.*, Br. for Fed. Resp. in Opp. at 8, and as acknowledged by this Court in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 77 (1977).

Executive determinations, and this Court's own more recent decision in *Weeks*.

That ruling is also in conflict with the D.C. Circuit's interpretation of this Court's holdings in *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), as the Secretary has acknowledged. *See* Br. for Fed. Resp. in Opp. at 8. As noted on page 13 of the Petition, the Tenth Circuit and the D.C. Circuit are in conflict as to whether *Journeycake* and *Delaware Indians* foreclosed the Department from finding that the Tribe did not abandon its tribal organization in the 1867 Agreement. Indeed, if the D.C. Circuit had thought the point already foreclosed, it would not have remanded the matter "for initial decision by the district court" concerning "the proper interpretation of the 1867 Agreement with the Delaware Tribe as a party to the proceedings and in light of the full administrative record, which is not before this court." *Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1503 n.15 (D.C. Cir. 1997). The D.C. Circuit thus also specifically directed, contrary to the Tenth Circuit's later holding, that the "full administrative record," and not merely the Agreement itself, must be reviewed because of the "light" it would shed on the "proper interpretation" of the Agreement.[2]

The Tenth Circuit also failed to defer to the agency charged by Congress and recognized by this Court as the

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[2] In addition to this conflict over the meaning of *Journeycake* and *Delaware Indians*, the D.C. Circuit is also in conflict with the Tenth Circuit concerning the ambiguity of the Agreement ("On its face, the language of the 1867 Agreement provides no clear indication as to which of the two Article 15 provisions applies." 117 F.3d at 1500) and the Department's authority to use a procedure other than Part 83 to reestablish federal recognition ("[F]ederal recognition of the Delawares [could be reestablished] either by means of the Final Decision, the Part 83 procedures, or another method." 117 F.3d at 1503). *See* Pet. at 24 n.10 and 29 n.15.

primary authority regarding federal/tribal relations and further compounded its errors by limiting that agency's powers in a way that, if allowed to stand, casts into doubt the previous recognition of several other Indian tribes.[3] Each and all of these are important and compelling reasons for review.

But that is far from all. As adverted to in the Petition, the immediate consequences for the members of the Delaware Tribe are disastrous. Not only has the Tenth Circuit's decision required the Bureau of Indian Affairs to terminate federal contracts with the Tribe, *see* Pet. at 12-13; the Tenth Circuit's decision effectively "decertified" the over 7,000 Native Americans who are enrolled only in the Delaware Tribe[4] from the protections and programs which, under various federal and state laws, are only afforded to members of federally recognized tribes, including: protections for Indian children under the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*; existing government construction and service contracts with preferences for minority contractors;[5] federal tax credits to Oklahoma businesses employing individual Delaware Tribe members;[6] prior and current state income tax exemptions in Oklahoma for individual Delaware Tribe

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[3] The Secretary does not take issue with the Petition's point, Pet. at 29, that at least six other tribes have been federally recognized outside of the Part 83 process.

[4] *See* Affidavit of Chief Larry Joe Brooks, Chief of the Delaware Tribe of Indians, Appendix G to the Application to Stay Mandate, filed under this Court's No. 04A832 (referenced in the Petition at 21 n.8), at ¶ 2 (Delaware Tribe has over 10,000 enrolled members, over 7,000 of whom are not enrolled in any other tribe).

[5] *See, e.g.*, 13 C.F.R. Parts 124-126; OMB Circular A-76 Update XI (March 1, 1999).

[6] 26 U.S.C. § 45A (2000).

members residing on and working for businesses operating on trust lands or allotments throughout Oklahoma; existing university scholarships and grants to individual Delaware Tribe members; ongoing tribal excavations and relocation of Delaware burial remains under the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 *et seq.*; potential criminal liability for individual members of the Delaware Tribe for possession of ceremonial eagle feathers and other items without the protections of the American Indian Religious Freedom Act, 42 U.S.C. §§ 1996 *et seq.*, as amended; and nullification of other tribes' current and prior criminal and civil jurisdiction over individual Delaware Tribe members within their jurisdiction, 25 U.S.C. §§ 1301 *et seq*. These are not "racial" protections, privileges, and effects; they are based on political distinctions that flow from tribal recognition and from being an *enrolled* member of a *recognized* Indian tribe, as this Court found in *Weeks*.[7] The ability of the more than 7,000 Delaware Tribe members who are not enrolled in other tribes to receive such benefits and protections is directly affected.[8]

The response of the Cherokee Nation to this crisis, that affected individuals can simply seek membership in the

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[7] 430 U.S. at 85-86. *See also, e.g., Morton v. Mancari*, 417 U.S. 535, 553-54 (1974) (Bureau of Indian Affairs employment preference for Native Americans does not constitute a racial preference).

[8] Among the programs directly affected by the termination of funding to the Tribe is its nationally acclaimed Delaware Child Development Program, which owns and operates three childcare centers and provides technical support and assistance to child care businesses. The program served 555 children. The number of children served drops to 37 with the loss of the BIA funds. *See* Affidavit of Chief Brooks, *supra* note 4, at ¶ 11. Similarly devastating effects occur in the Tribe's elder nutrition program, the elder housing program, the Low Income Home Energy Assistance Program, and the Tribe's health clinic. *Id.*

Cherokee Nation, is painfully similar to the tactic which the record reflects was employed against the Delawares in 1867, when the local Indian agent simply withheld annuity payments until tribal members agreed to relocate to Cherokee territory. *See* Pet. at 6. What is more, it ignores the cultural and political significance of such an act. It matters in the most fundamental way possible to each and all of the more than 7,000 enrolled Delawares that they be recognized as – because they *are* – members of the Delaware Tribe of Indians. This Court, the Congress, and the Executive branch have each recognized this historical truth, repeatedly. As this Court itself found in *Weeks*:

> Each Delaware moving to Indian Country . . . was to receive . . . the right to become a member of the Cherokee Nation. Most of the Delawares . . . were gradually assimilated for most purposes into the Cherokee Nation. . . . Despite their association with the Cherokees, these Indians . . . have over the years maintained a distinct group identity, and they are today a federally recognized tribe.

430 U.S. at 77. As Congress noted in appropriating funds to the Tribe:

> This group, now known as the Delaware Tribe of Indians . . . acquired full political rights in the Cherokee Tribe, but they maintained their group identity, having tribal chiefs and business committees continuously until the present time.

S. Rep. No. 96-628, at 5 (1980). And as the Department determined:

> [The] national or tribal character of the Delaware-Cherokees was never lost or completely merged into that of the Cherokees.

Department of the Interior Decision Memorandum of January 23, 1941 (AR vol. 1 0015).[9] It is thus no answer to the Tenth Circuit's obliteration of federal relations with their tribal government to say that the Delaware have a political right to "become" Cherokee.

Sadly, many of the above points also apply to the response of the Secretary. While it is gratifying that the Secretary agrees the Tenth Circuit erred in all the respects urged in the Petition, the comfort taken by the Secretary in the Tenth Circuit's refusal to consider the evidence of post-1867 relations between the United States and the Delaware Tribe is cold comfort to the thousands of members of the Delaware Tribe directly and immediately affected by its unprecedented decision. Moreover, regardless of whatever administrative avenues might be available, the Delaware Tribe will not have another opportunity, outside of this appeal, to challenge the Tenth Circuit's erroneous interpretation of the 1867 Agreement, and neither will the Secretary. Neither Congress nor the Executive can correct the Tenth Circuit's erroneous characterization of this Court's holdings in *Journeycake* and *Delaware Indians*. As the insidious result thereof, a tribe which has in fact maintained not only its own tribal organization and government for

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[9] *See also, e.g., Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm. 253, 265 (1952):

> They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments . . . separate from the Cherokees. . . . They were governed by hereditary tribal chiefs until . . . 1895. Thereafter, they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group. . . .

centuries, but has also maintained a government-to-government relationship with the United States since 1778, must suffer the indignity of submitting to administrative procedures meant only for tribes that have *not* maintained their tribal organization, and must be prepared to wait up to 15 years or more for those procedures to run their course. *See* Pet. at 27 n.12 and 28 n.14.

This affront to tribal identity is not academic. In addition to the devastating practical effects detailed above, its moral effects cannot be overstated. The Delaware Tribe of Indians is not a museum tribe, existing only to preserve customs and rituals. It is the chosen governmental organization of the 7,000 Native Americans who are enrolled only in it, and as such it exists both to govern them concerning tribal matters and to relate to other governments, especially the federal government, regarding matters that affect it as a tribe. That a lower federal court has erroneously voided all federal relations with that government is not a tolerable situation for its members, even for a matter of days or months, let alone for an uncertain number of years. Thus, if the Tenth Circuit is wrong, it is intolerably wrong, and this Court's review should not be withheld simply because the Secretary – who agrees that it is wrong, on all counts – may be willing to let the Tribe suffer its consequences for an indefinite time.[10]

* * *

It is rare — perhaps unique — that a lower federal court decision brought before this Court for review has directly

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[10] While the Secretary adverts to possible future Departmental action, *see* Br. for Fed. Resp. in Opp. at 7, 9 n.2, the procedural fact is that the Tenth Circuit explicitly denied the Tribe's request for a remand to the Department, *see* Pet. at 12, instead ordering that "any action taken by the agency on its 1996 final decision is void." *Id.*

flouted all three branches of the national government, but that is precisely what has occurred here. In the many years since 1867, Congress, the Executive, and this Court have each regarded the Delaware Tribe of Indians as a "federally recognized tribe," but the Tenth Circuit's unprecedented decision has nonetheless voided that federal/tribal governmental relationship. It has thereby severely and negatively affected the daily lives of over 7,000 Native Americans. They and their chosen government respectfully submit that decision merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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